IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-279

MAGNUS PETROLEUM COMPANY, INC. AND MARPAT CORPORATION, *Petitioners*

v.

SKELLY OIL COMPANY, *Respondent*

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

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SUBJECT INDEX

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Petitioners, Magnus Petroleum Company, Inc. and Marpat Corporation, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on May 23, 1979.

### OPINIONS BELOW

The opinion of the Court of Appeals, —— F.2d ——, is unofficially reported at 1979-1 CCH Trade Cases ¶ 62,666, and appears in the Appendix hereto at 1a. The order rendered without opinion by the Court of Ap-

peals on June 20, 1979, upon Petitioners' petition for rehearing and suggestion for rehearing *en banc*, denying said petition for rehearing, appears in the Appendix hereto at 36a. The opinion of the United States District Court for the Eastern District of Wisconsin, denying Respondent's motion for a judgment notwithstanding the verdict or the alternative relief of a new trial, reported at 446 F.Supp. 874, appears in the Appendix hereto at 17a. The judgment notwithstanding the verdict entered on July 9, 1979 by the District Court pursuant to the order of the Court of Appeals, not officially reported, appears in the Appendix at 37a.[1]

## JURISDICTION

The judgment of the Court of Appeals was entered on May 23, 1979. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1), and this petition is filed within the time prescribed by 28 U.S.C. § 2101(c).

## QUESTIONS PRESENTED

1. When the prevalent industry-wide use of a restrictive marketing practice which is challenged in a private non-per se antitrust action is commonly known within that industry, must the private enforcement plaintiff still demonstrate the requisite anticompetitive market considerations with virtually unavailable comprehensive comparative analytical incidence data? Or, may the testimony of knowledgeable industry experts attesting to such prevalence suffice as proof of that element of a prima facie case?

2. For purposes of establishing a prima facie case of anticompetitive object or effect in a non-per se case under Section 1 of the Sherman Act, or the potentiality of a substantial lessening of competition in a non-per se case under Section 3 of the Clayton Act, should not a sufficient test be whether under all the circumstances such anticompetitive object, effect or potentiality may be found from facts other than the proportion of total commerce affected in the relevant market? Or, is proof of the share of the market foreclosed invariably required?

3. Whether the exclusive dealing condition required for a violation of Section 3 of the Clayton Act may be satisfied by a branded supplier's long-term financing arrangements that interrelate with his shorter-termed brand-franchise so as to effectively preclude the franchisee from undertaking the distribution of a competing branded product under the brand-franchise of a competing branded supplier for many years beyond the minimum period of that shorter-termed franchise? This, even though such combination of financing arrangements and franchise do not operate so as to preclude the simultaneous distribution by the franchisee of nonbranded, unfranchised product that is otherwise comparable which he obtains on the open "spot" market?

4. Whether vertical arrangements which impose crippling interbrand restraints on local independent gasoline jobbers' freedom of action may not be found to constitute antitrust violation unless it is further demonstrated that there is consequent regional impact upon major integrated gasoline suppliers? Or, whether im-

[1] Unaccompanied numbers enclosed in parenthesis refer to those numbered pages of the Trial Transcript. When preceded by "A", the reference is to those numbered pages of the Appendix filed in the Court of Appeals. When preceded by "Ex(s).", the reference is to such numbered trial exhibit(s). Numbers followed by "a" refer to the appendix pages to this petition.

pact may properly be considered in terms of the local market where the consumer's needs actually are served?

5. Whether the Court of Appeals, in setting aside a jury verdict in a private antitrust action challenging vertical arrangements, improperly compartmentalized the evidence, especially that which showed anticompetitive intent, and failed to review evidence which demonstrated that the restraints were significantly larger than the necessary protection of the party required, in the context of the wide-ranging inquiry appropriate in non-per se cases?

## STATUTES AND EVIDENTIARY RULES INVOLVED

### Statutes

Section 1 of the Sherman Act, 26 Stat. 209, 15 U.S.C. § 1, provides in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal . . . ."

Section 3 of the Clayton Act, 38 Stat. 731, 15 U.S.C. § 14, provides in pertinent part:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods . . . or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods . . . of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."



Section 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C. § 15, provides in pertinent part:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

### Federal Rules of Evidence

#### Rule 702. Testimony by experts

> "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

#### Rule 703. Bases of opinion testimony by experts

> "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."

## STATEMENT OF THE CASE

### A. The Parties

Petitioner Magnus Petroleum Company, Inc. is a Wisconsin corporation that distributes refined petroleum products, including gasoline, with its principal place of business in Sheboygan, Wisconsin. Petitioner Marpat Corporation is a Wisconsin corporation which purchases and leases real estate and equipment in con-

nection with the Magnus distributorship. Arthur P. Magnus owns and controls both corporations.

Respondent Skelly Oil Company at all pertinent times was a Delaware corporation with its principal place of business in Tulsa, Oklahoma. It is a marketer of petroleum products, including Skelly brand gasoline, in seventeen states, including Wisconsin. In 1964, Magnus and Skelly entered into an initial franchise sales agreement in which Magnus agreed to buy specified quantities of gasoline and other refined petroleum products. That initial agreement was replaced in 1965, and again in 1966. The 1966 agreement called for an initial five-year term, followed by automatic annual renewals unless either party would give notice of nonrenewal. In addition, the parties entered into transactions for the financing of three service stations acquired by Magnus in Sheboygan.

Skelly marketed through some 3,100 branded service stations, approximately 900 of which it supplied directly, with the remainder being supplied by 760-800 jobbers such as Magnus and by consignees. (Ex. 421). Some 200 of the jobbers had service stations financed under the same program, some for as many as 8-10 outlets (652), including 40-50 such arrangements among 140-150 Skelly jobbers in the northern region of Skelly's marketing, which included Wisconsin. Magnus was the third largest jobber in the Sheboygan area when it converted to the Skelly brand in 1964. (A 29). In 1970-71 when Magnus was negotiating to switch over to the Sun Oil Company and its DX brand, Magnus was the supplier of ten of the total of 88 service stations in the greater Sheboygan area. There were in all twelve other jobbers with whom Magnus competed in that area during the period 1963 to 1973.



### B. Course of Proceedings

The action was commenced on July 3, 1973. The basis of the District Court's jurisdiction is § 4 of the Clayton Act, 15 U.S.C. § 15. In November, 1976, after a ten-day trial, a jury awarded Petitioners $185,000 in damages before trebling, resulting in the entry of judgment for $555,000 plus an attorney fee award of $45,400. Skelly's post-trial motions were denied in January, 1978. Skelly made timely appeal to the Court of Appeals which by its judgment of reversal on May 23, 1979 ordered the entry by the District Court of a judgment notwithstanding the verdict, which was done on July 9, 1979.

### C. Statement of the Facts

This private enforcement antitrust action undertook to challenge a restrictive gasoline marketing practice that has been pervasively used both company-wide and industry-wide by integrated branded oil companies to prevent their independent distributors, *i.e.*, their brand-franchised jobbers, from switching to the franchised brand of a competing branded oil company. This the jobber otherwise would be free to do by his not permitting the franchise to automatically renew. The challenged practice operated in conjunction with the long-standing industry-wide policy against "dual distribution" whereby branded oil companies will not sign a franchise with a jobber while that jobber still has in force his franchise from another branded oil company. (343).

The practice centers around the tying of lease/subleaseback type conventional long-term service station financing instruments into the substantially shorter-term franchise. The instruments are tied together so that the practical effect will be that the jobber will not

be accessible for the replacement of his franchise with that of a competing branded oil company until the expiration of the full period of all of the long-term financing, even if such financing were to be fully paid much earlier than called for. This involving many years beyond the shorter-term contractual commitment of either party provided in the franchise itself.[2]

As fact of damage, Petitioners claim that they were precluded by the operation of Respondent Skelly's financing instruments upon Petitioners' three Skelly-financed stations from becoming a branded franchisee of Sun Oil Company in Oshkosh and Fond du Lac, Wisconsin and from acquiring a jobbership in Oshkosh which together with their Sheboygan operation would be converted to Sun's DX brand. The Court of Appeals in reversing did not address either the fact of damage or quantum of damages issues raised in Skelly's appeal.[3]

[2] Election by the Skelly jobber to not have the franchise renew yearly following the initial five-year term would require him to obtain within 60 days the funds to pay off the balance of the 15-year mortgages. However, the financing lease to Skelly continued for its full 15-year term, and if the jobber elected to continue operating the stations, his jobbership would be obligated under the sub-lease to continue to purchase annually at least 100,000 gallons of Skelly gasoline per each financed station. While he would be paying Skelly's branded price, he no longer being a franchisee would not be permitted to sell that gasoline under the Skelly brand. At the same time, the jobber's non-branded competitors can purchase equivalent unbranded product on the open market at the cheaper non-branded price. Since Skelly product will continue to flow through the financed stations' pumps, the financing programs of Skelly's competitors become unavailable as the source for the money with which to make the so triggered accelerated payoff. The contemplated practical effect is that the jobber stays with the franchise until the completion of the amortization period of the most recent financed station. (341-42, 351-56, 358, 377-78). The sub-lease's 100,000 gallons minimum would apply even if Skelly were to cancel the franchise, so long as Skelly would make the gasoline available as unbranded. (A166). Each of Magnus' three financed stations averaged 120,000 gallons annually. (138)



Petitioners claim that the common, widespread, standard operating use by the branded oil companies to that end of such lease/sub-leasebacks, of which Respondent Skelly's were typical, when considered in the context of the franchise agreements and the industry-wide policy against dual distribution, exceeded the outer limits of restraint which were reasonably necessary for the protection of the branded oil companies' legitimate interests, in violation of § 1 of the Sherman Act. The District Court in denying Respondent's post-judgment motions concluded that there was ample evidence from which the jury could have found that the objective of Respondent's financing arrangements was to restrain trade and that those arrangements revealed anti-competitive intent in violation of § 1 of the Sherman Act. (25a). The Court of Appeals disagreed, first, "because the financing arrangements covering the three stations only required them to purchase 100,000 gallons . . . annually" per station, and "[t]hese amounts were *de minimis* in view of plaintiffs' total requirements" of some 1,000,000 gallons annually. And secondly, even if the financing agreements were a means of preventing Petitioners from terminating the franchise, Petitioners still were unable to show that the foreclosure of the entire annual minimum of some 700,000 gallons as

[3] If the Court grants the petition for a writ of certiorari Petitioners propose to argue that Skelly's grounds for appeal not reached by the Court of Appeals would not have required reversal and that this Court should, unless it limits the grant of certiorari to the grounds on which the Court of Appeals reversed, reinstate the judgment of the District Court.

called for by the Skelly franchise constituted an unreasonable restraint of trade. The consequence being that "the requisite evidence to show that under Section 1 of the Sherman Act the effect was substantially adverse is also fatally lacking." (15a).

Petitioners further claim that the common, widespread, standard operating industry practice of designing said instruments so as to use the financed stations as a long-term lock-in lever by which to so control for many years the entire branded gallons marketed by the jobber, constituted exclusive dealing arrangements. Moreover, that collectively their use constituted the requisite potentiality of a substantial adverse effect on competition, all in violation of § 3 of the Clayton Act. The Court of Appeals attached no significance to the fact that the non-Skelly gallons of gasoline which Magnus could still purchase were purchases made in the "spot" market on an unbranded, non-franchised basis, rather than the purchase of the branded product under the franchise of any of Skelly's branded oil company competitors. Rather, it determined that since Skelly did not require Magnus to purchase any more than 700,000 gallons of its annual requirements of some 1,000,000 gallons, that the exclusive dealing condition proscribed by § 3 of the Clayton Act did not exist. (6a). It disagreed with the contrary conclusion of the District Court that there was sufficient evidence "showing that Magnus was under great pressure to purchase all of his requirements of gasoline from Skelly Oil." The District Court included therein the acknowledgment by Skelly's field representative "that the Magnus franchise was eventually continued on only a month-to-month basis so that Mr. Magnus would be persuaded to increase his purchases of Skelly products", and that



"[f]ollowing the conversion to a month-to-month arrangement, Magnus did, in 1972, purchase virtually all of his gasoline requirements from Skelly Oil." (21a).[4]

With respect to the question of whether "the inability of jobber-retailers to change distributors because of the financing agreements potentially foreclosed competition significantly", the Court of Appeals required evidence that would disclose the proportion of retail gasoline sales foreclosed by the existing company-wide, industry-wide financing agreements. (12a). It determined that, while "plaintiffs introduced testimony that, many branded distributors had financing programs and single-distributor policies similar to Skelly's", that "none of the evidence . . . purported to establish the share of the gasoline sales foreclosed by such arrangements", and that "[t]here simply were no facts from which a potential foreclosure of a significant amount of competition could be inferred from the evidence of company-wide or industry-wide practice." (13a). This notwithstanding the testimony of Skelly's marketing vice-president that such information is not available because "[o]ur records show invoicing only to the jobber account and the jobber may dispose of this merchandise through commercial accounts, industrial accounts, through service stations that he does not own . . ." (653).

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[4] While it may have taken until 1972 for the month-to-month reinstatement device to have reached this virtual 100% pinnacle, it was back as early as mid-November, 1970, that Skelly laid the plans for accomplishing that result. (A 94). And its notice on December 28, 1970 to cancel the annually renewing franchise (A 95), was just 18 days prior to the date of January 15, 1971, which Sun Oil Comany's representative filled in on the instruments that would be used if Magnus could convert its three Skelly-financed stations over to Sun Oil Company and its DX brand. (65-67; Exs. 151, 156, 158, 160-163).

## REASONS FOR GRANTING THE WRIT

**UNWARRANTED RIGIDITY HAS MISINTERPRETED THIS COURT'S INTENDMENT IN ITS REEMPHASIS OF ANTITRUST MARKET CONSIDERATIONS DURING THE 1976 TERM, THEREBY ERRONEOUSLY TRANSLATING THAT REEMPHASIS INTO AN INFLEXIBLE, UNALTERABLE DEMAND FOR COMPREHENSIVE COMPARATIVE INCIDENCE DATA EVEN WHEN SUCH DOES NOT EXIST, AND EVEN WHEN USE OF THE CHALLENGED RESTRICTION IS WELL-KNOWN BY TESTIFYING INDUSTRY EXPERTS TO BE PREVALENT THROUGHOUT THE INDUSTRY. IF NOT CORRECTED BY THIS COURT, VIRTUAL ERADICATION OF PRIVATE ANTITRUST ENFORCEMENT IN NON-PER SE CASES IS THREATENED, AT LEAST FOR THOSE WITHOUT VERY SUBSTANTIAL FINANCIAL WHEREWITHAL. THE INSTANT CASE IS A MOST APPROPRIATE VEHICLE FOR THE COURT TO MAKE THAT CORRECTION. THE INTENDMENT OF FEDERAL EVIDENCE RULES 702 AND 703 IS ALSO IMPERILED AND REQUIRES PROTECTION.**

During its 1976 Term, this Court reemphasized that "the antitrust laws . . . were enacted for the 'protection of *competition, not competitors* . . .'," *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 488 (1977), noting as well that "an antitrust policy divorced from market considerations would lack any objective benchmarks." *Continental T.V., Inc.* v. *GTE Sylvania, Inc.,* 433 U.S. 36, 53 n. 21 (1977). The Court's reemphasizing of these broad axioms of antitrust policy has triggered the imposition of an unwarranted rigidity in their interpretation and application which threatens the virtual eradication of private enforcement of the antitrust laws in non-per se cases, at least so far as those American entrepreneurs having only average financial wherewithal are concerned. That rigidity narrowly perceives the aforequoted requisite market considerations as an unalterable demand for comprehensive comparative analytical inci-



dence data even when the aggregation of that data is either impossible or beyond the practical limits of the burden of proof which may be demanded of a treble-damage plaintiff.

Petitioners have fallen victim to that rigidness in the instant case, where the aggregation of such proof as a practical matter is unattainable in the context of gasoline marketing as practiced by the branded oil companies in the United States. Such was the demand upon Petitioners, notwithstanding that the pervasiveness of the use throughout the industry of the challenged practice was a matter of common knowledge within the industry and was so evidenced by the uncontroverted testimony of Petitioners' gasoline marketing expert witnesses.

So accepted has become that rigidity, that Respondent's counsel waxed so bold as to conclude its reply brief before the court below, thusly:

> Plaintiffs' counsel in summation told the jury that its verdict should "speak very loudly" for the "principle" that ". . . beyond the outer limits of what's reasonably necessary, you should not straightjacket the small businessman because . . . he is precious, little but precious, and essential to our economy . . . ." (Tr. 1300). "[T]hat's why we have the antitrust laws," he argued. (*Id.*). But that is not why we have the antitrust laws. "The antitrust laws . . . were enacted for 'the protection of competition, not competitors' . . . ." *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 488 (1977). "[T]he aesthetic delights of smallness and the yearning to resurrect a nation of sturdy Jeffersonian yeoman will not be permitted to decide antitrust cases."
>
> Judgment notwithstanding the verdict should be entered.

The cited source of the reflection on Jeffersonian tradition is Richard A. Posner, ***The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision,*** 45 U. Chi. L. R. 1, 13 (1977). In the same article, that legal scholar finds reinforcement for his impression of such dwindling importance of smallness "by the frequency of [this] Court's citations to the writings of members of the 'Chicago School', like [Robert H.] Bork and me who argue that economic efficiency is the only goal of antitrust law." *Id.* He goes on to comment that what this Court calls "the prevailing standard of analysis," *i.e.*, the Rule of Reason, "is little more than a euphemism for nonliability." *Id* at p.14.

If such perception of this Court's actual intendment is erroneous, then the Court should correct that perception by supplementing that reemphasis of its 1976 Term by also reaffirming its earlier pronouncements that "[t]rial and appellate courts alike must also observe the practical limits of the burden of proof which may be demanded of a treble-damage plaintiff . . . ," ***Zenith Radio Corp.*** v. ***Hazeltine Research, Inc.,*** 395 U.S. 100, 123 (1969); that the courts ought "not add requirements to burden the private litigant beyond what is specifically set forth . . . [in the antitrust] laws," ***Radovich*** v. ***National Football League,*** 325 U.S. 445, 454 (1957); and that "the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster." ***United States*** v. ***Topco Associates,*** 405 U.S. 596, 610 (1972).

The discussion which follows endeavors to demonstrate that the instant case constitutes a most appro-



priate vehicle for the Court to use in making it clear to the lower federal courts, to the antitrust bar and to the academic antitrust community that it means for those earlier pronouncements to be just as applicable as ever and to be construed ***in pari materia*** with, rather than as diminished by, the "newly accepted economic approach." [5]

**1. Expert testimony on well-known, prevalent, industry-wide restrictive practice should suffice, especially when comprehensive comparative incidence data does not exist.**

The trial transcript reflects through qualified experts who are thoroughly familiar with the gasoline marketing practices of the major oil companies in the United States, that the challenged Skelly practices were typical of those used pervasively throughout the industry. Retired Shell vice-president Holdgraf based on his 35 years of major oil company experience testified to such typicality (341-42, 347, 358), and that the use of the long-term lease to "telescope" the 5-year franchise into a relationship for the full 15-year term of the lease was in furtherance of an "endeavor to perpetuate the control of the oil company over the jobber's business." (348). Economist Allvine based on his extensive research of gasoline marketing practices testified that "[t]here was a lot of competition for jobbers in the . . . early 1960's" and that the use of these long-term instruments "became ***very prevalent*** in the 1960's to reduce the likelihood of a jobber switching from one supplier to another and locking

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[5] Richard A. Posner, ***The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision,*** 45 U. Chi. L. R. 1, 13 (1977). But, see F. M. Scherer, ***The Posnerian Harvest: Separating Wheat from Chaff,*** 86 Yale L. J. 974, 976 (1977).

him with existing supplier." (377-78). This evidence stands unrefuted, as did Holdgraf's testimony that dual distribution is unheard of in the industry, *i.e.,* a single jobber holding the brand franchise of more than one branded oil company at a time (343), as to which Skelly's own Messrs. Peterson and Luke were in accord (415-16, 627). Well known, pervasive, common, widespread industry practice testified to by qualified experts particularly when unrefuted and uncontravened, must be deemed to constitute credible and sufficient evidence if effective private enforcement of the antitrust laws is to apply to non-per se violations.

The impossibility as a practical matter of any private enforcement plaintiff adducing the data so required by the court below for even one oil company with respect to just one jobber, let alone as to Skelly and each of Skelly's competitors and the respective jobbers of each of those oil companies in any given relevant market, is explicitly recognized by the Court of Appeals: "[i]t was impossible to estimate the amount of Skelly gallons sold through Skelly-financed stations," since such record keeping never comes into existence. (12a).

The insistence by the court below that a private antitrust enforcement plaintiff present comprehensive comparative analytical incidence data as to a defendant oil company and its oil company competitors in order to support the testimony of such plaintiff's qualified experts regarding well known, common, pervasively used, standard operating gasoline marketing practices rigidly limits the objective benchmark market considerations of gasoline marketing to an inflexible demand for quantified ratios of anticompetitive effect. This, in an industry where the data discovery



and tabulation if attainable at all would only be so at a prohibitive investment of time and money, making private enforcement of the antitrust laws economically unfeasible if not altogether impossible except in per se cases.

This Court has not required even of the United States government as an antitrust plaintiff a standard of proof which "if not virtually impossible to meet, [is] at least most ill-suited for ascertainment," and where the requiring of such explicitness would constitute "a means of conferring immunity upon the practices which [§ 3 of the Clayton Act] singles out." *Standard Oil Co.* v. *United States,* 337 U.S. 293, 310-11 (1949). Yet, that is just what the court below has required of the Petitioners.

Moreover, such rigidity undermines the flexibility contemplated by Federal Evidence Rules 702 and 703 regarding the role of expert testimony on complex economic issues.

**2. Requisite market considerations should not invariably require knowledge of the share of the market foreclosed and may appear from facts other than the proportion of the total commerce in the relevant market.**

The District Court relying on language found in *Lessig* v. *Tidewater Oil Company,* 327 F. 2d 459, 468 (9th Cir. 1964), *cert. denied,* 377 U.S. 993 (1964), (22a), found that "specific evidence of market foreclosure in a relevant market in which the exclusive contracts exist" was not required.

It is inherently within the language of § 3 of the Clayton Act that the appropriate test is precisely that described by the *Lessig* court: "whether the jury can

find from all the circumstances that the effect of the particular arrangements 'may be to substantially lessen competition,' " and that this indeed "may appear from facts other than the proportion of total commerce in the relevant market which is subject to restraint." The common sense of the proposition would have been just as applicable even if specific evidence of market foreclosure had not existed in the *Lessig* case.

And this is uniquely appropriate to the petroleum industry in the United States, as to which there is explicit Congressional recognition that

> "the independent branded and non-branded distributor[s] of refined petroleum products . . . *have an importance to the United States economy far out of proportion to their market shares,* because they continually spur the major integrated firms to improve their own efficiency in the production, refining, transportation and marketing of products." H.R. Rep. No. 93-531, 93d Cong., 1st Sess. 18 (1973). *Accord,* S. Rep. No. 93-159, 93 Cong., 1st Sess. 24 (1973).[6] (728). (Emphasis added.)

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[6] This concern was expressed in the specific context of assuring adequate supplies of product to this sector of the industry during times of shortage. Accordingly, Congress directed that the allocation regulations mandated by the Statute must "to the maximum extent practicable . . . preserve the competitive viability of independent refiners, small refiners, non-branded independent marketers, and branded independent marketers." Emergency Petroleum Allocation Act of 1973, § 4(b)(1)(D), 15 U.S.C. § 753(b)(1)(D) (Supp. III 1973).



**3. Exclusive dealing may still be factually found to exist when the franchisee's branded product requirements are confined to franchisor's branded product even though he is not precluded from purchasing non-branded product on the open market.**

The Court of Appeals has failed to take into consideration the vital differentiation between Magnus' continuing freedom to purchase unbranded gasoline on the "spot" market, and Magnus' lack of freedom to purchase branded product under a contemporaneous franchise with any branded competitor of Skelly.[7] In this regard the record is clear that Skelly foresaw, contemplated and very well knew that unless Magnus was willing to walk away from its financed stations, that the continuation of the Skelly franchise until the financing leases would run their full 15 year terms would effectively disenable Magnus from undertaking the purchase of any branded product under the franchise of any branded competitor of Skelly for the full length of those leases. So, in the realistic context of brand competition and branded competitors, Magnus was indeed restricted exclusively to Skelly.[8]

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[7] This distinction has recently received judicial cognizance in the context of recoverable damages. *Lee-Moore Oil Co.* v. *Union Oil Co. of California*, 1979-1 CCH Trade Cases ¶ 62,651 at pp. 77,690-77,691 (4th Cir. 1979).

[8] (170-71, 109-110, 161-63, 415-16, 627, 343, 351-56).

**4. Commercial realities of gasoline marketing warrant consideration of the competitive impact of the supplier's restrictive practices upon the distributor in the context of the local community market which is where the oil companies actually compete and where the ultimate purchasers practicably purchase their gasoline needs.**

The Court of Appeals determined that "[e]ven if, as plaintiffs insist, the relevant market for retail gasoline sales is the 'community', it does not follow that the 'community' is the relevant market to ascertain foreclosure of Skelly's competitors (many of whom were regional or national brands)." (13a). This statement misperceives the commercial realities of the industry, which this Court has instructed shall dictate the selection of the relevant geographic market. *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 336-37 (1962). As realistically observed by Justice Jackson in his dissenting opinion in *Standard Oil Co.* v. *United States,* 337 U.S. 293, 323 (1949), "the oil companies compete to get the business of the ultimate consumer—the man in whose automobile the gas is used" and the retail stations "are the instrumentalities through which competition for this ultimate market is waged," with "the retailer [and so also the distributor] in this industry [being] only a conduit from the oil fields to the driver's tank."

It is only by such recognition of the "purchaser" as being the ultimate gasoline consumer, that the following language from *Tampa Electric Co.* v. *Nashville Coal Co.,* 365 U.S. 320, 327 (1961), would have pertinence to the commercial realities of gasoline marketing:

> ". . . [T]he area of effective competition in the known line of commerce must be charted by careful selection of the market area in which the seller operates, and to which the *purchaser* can practicably turn for supplies." (Emphasis added.)



And it is to service stations in the community where they live that those ultimate consumer-purchasers of gasoline "can practicably turn for supplies."

In terms of the "community" here involved, the greater Sheboygan, Wisconsin area, and in the 1970-71 period when the Sun/Magnus negotiations were ongoing, there were 88 service stations of which Magnus was the supplier for 10, being 11.36%. (181). Thus, a significant share of that relevant market under the percentage considerations as discussed in *Standard Oil Co.* v. *United States,* 337 U.S. 293 (1949) and *Tampa Electric Co.* v. *Nashville Coal Co.,* 365 U.S. 320 (1961). This, even after proportionately deducting out the 30% of that 11.36% for the 300,000 of its 1,000,000 gallons total requirements that Magnus could buy on the non-branded "spot" market without breaching the 700,000 gallons annual minimum of Skelly gallons called for by the Skelly franchise.

Even as to Wisconsin as a whole, the middle-sized gasoline suppliers such as Skelly did not lose any significant portion of their respective market shares during the ten years, 1964-1974. (721-22). This is consistent with the observation in *Standard Oil Co.* v. *United States,* 337 U.S. 293, 309 (1949), relating to the inference permitted by the industry-wide use of exclusive arrangements in gasoline marketing where although their position relative to each other has fluctuated, the major oil companies as a group have at least maintained their control of the market, *i.e.,* "their effect has been to enable the established suppliers . . . collectively, even though not collusively, to prevent a late arrival

from wresting away more than an insignificant portion of the market."[9]

**5. The Court of Appeals tightly compartmentalized the evidence, especially that of anticompetitive intent, and failed to review evidence that the restraints significantly exceeded the supplier's needs for protection.**

The Court of Appeals insisted upon compartmentalizing Petitioners' proof. Rather than considering the overall relationship of Magnus and Skelly in its totality, it isolated Skelly's exclusive dealing practice with which it initiated the relationship by the five-year franchise in 1964, from the 99.6% virtual total requirements that Magnus purchased from Skelly in 1972 under the ending month-to-month franchise. Likewise, the court below conclusively divided from its interrelationship to the franchise, the 100,000 gallons annually of the respective financing sub-leases, thereby totally avoiding the importance of the leverage effect which those sub-lease requirements had in extending Magnus' commitment under the franchise for many years beyond that required by the franchise itself.

In this way, the Court of Appeals has done the very thing which this Court has stated should not be done: "tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each". *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962). The Court of Appeals relied on the same rigid rationale with respect to Petitioners' § 1, Sherman Act claim as it did in considering the § 3, Clayton Act claim. Additionally, it was an appropriate factual issue for the jury as to whether the challenged type restriction exceeded "the outer limits of restraint" which were reasonably necessary for Skelly's protection. *American Motor Inns, Inc.* v. *Holiday Inns, Inc.*, 521 F.2d 1230, 1248-49 (3d Cir. 1975). Neither the extent nor length of the pervasive lock-in practice was in any way based on what it would take either in gallons or in terms of time to return to the oil company "its investment with appropriate return" which Skelly's own economist, Caputo, testified to be the legitimate demand of investor oil company suppliers. (753-54).[10] Rather, the device was structured to use the "telescoping" interrelationship between the five year franchise and the lease/sub-lease arrangements to give the oil company a minimum fifteen-year hold, relating the fifteen years to nothing more than the amortization schedule of the mortgage financing (405), a matter wholly unrelated to either the early pay-off of the financing or to getting back any investment with



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[9] Such effect is not just limited to a "late arrival." In the instant case, DX having been displaced from the Sheboygan area since 1963 when Skelly acquired the business of the DX jobber in Sheboygan, was still out of that market when it was negotiating to return to it via Magnus in 1970-71. (572, 613-14, 65).

[10] Shelly's economist, Caputo, suggested the following as a feasible way to satisfy the needs of the oil company, the jobber and the consumer and thereby to "contribute to competition":

> ". . . [D]etermine the quantity of sales on a year-by-year basis over a five year period that is necessary for the investor oil company supplier to get back his investment with appropriate return . . . then we would say, if it's a five year contract, anything the jobber wants to buy and resell beyond the million gallons a year for five years . . . the jobber can indeed buy from someone else and sell to whoever he chooses . . . , then the need to protect the investor is satisfied . . . and the increase beyond can come from whoever the jobber chooses. *That might be a way to protect the legitimate demands of investor oil company suppliers as well as give flexibility for the jobber and adequate protection for the consumer from the competitive point of view.*" (Emphasis added). (753-54).

appropriate return. As stated by this Court in *Standard Oil Co.* v. *United States,* 337 U.S. 293, 308 (1949):

> "Likewise bearing on whether or not the contracts were being used to suppress competition, would be the *conformity of the length of their term to the reasonable requirements* of the field of commerce in which they were used." (Emphasis added).

In the classic statement of the rule quoted by then Circuit Judge Taft in *United States* v. *Addyston Pipe & Steel Co.,* 85 Fed. 271, 282 (6th Cir. 1898), *aff'd* 175 U.S. 211 (1899):

> "We do not see how a better test can be applied to the question whether this is or not a reasonable restraint of trade than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party requires can be of no benefit to either. It can only be oppressive. It is in the eye of the law, unreasonable."

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 20, 1979

# APPENDIX.

In the

# United States Court of Appeals

## For the Seventh Circuit

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Nos. 78-1387, 78-1388

MAGNUS PETROLEUM COMPANY, INC. and MARPAT CORPORATION,

*Plaintiffs-Appellees,*
*Cross-Appellants,*

*v.*

SKELLY OIL COMPANY,

*Defendant-Appellant,*
*Cross-Appellee.*

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On Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 73-C-355—**Myron L. Gordon**, *Judge.*

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HEARD FEBRUARY 14, 1979—DECIDED MAY 23, 1979

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Before CUMMINGS and SPRECHER, *Circuit Judges*, and LEIGHTON, *District Judge.**

CUMMINGS, *Circuit Judge.* This private antitrust action was brought in July 1973 by a Sheboygan, Wisconsin, gasoline and fuel oil distributor (Magnus) and the Company (Marpat) owning the land and buildings in-

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* District Judge George N. Leighton of the Northern District of Illinois is sitting by designation.

volved in the distributorship.[1] Defendant Skelly Oil Company (Skelly) formerly was Magnus' supplier of gasoline, furnace oil and related products.[2] In seeking damages in excess of $700,000 (before trebling under Section 4 of the Clayton Act, 15 U.S.C. § 15), plaintiffs asserted that the defendant violated Section 1 of the Sherman Act (15 U.S.C. § 1) and Section 3 of the Clayton Act (15 U.S.C. § 14).

According to the complaint, plaintiffs marketed Skelly's petroleum products in Sheboygan County, Wisconsin, and adjacent areas from 1964 until February 28, 1973, when Skelly terminated its relationship with plaintiffs. The parties stipulated that plaintiffs were both wholesale and retail gasoline distributors. In the former capacity, they were "jobbers," operating two bulk plants (storage facilities). One of these, in Haven, Wisconsin (seven miles from Sheboygan), was owned by Magnus. Another facility, located in Sheboygan, was leased by Magnus from Skelly. In its capacity as a jobber, Magnus on February 29, 1964, entered into a "Franchise Sales Agreement" with Skelly. Under this agreement, Magnus was committed to buy and Skelly to sell and deliver certain specified quantities of gasoline each year.[3] Magnus also agreed to sell and deliver petroleum products to four specified Skelly-owned stations in the Sheboygan area.

The complaint states that the mainstay of plaintiffs' retail distributorship was the fee ownership of four

[1] Marpat also owns the petroleum dispensing equipment, including tanks, pumps and air compressors, used by Magnus. The only stockholders, officers and directors of both corporations were Arthur P. Magnus and members of his immediate family.

[2] The only product involved in this case is gasoline.

[3] This agreement was superceded by new agreements on March 1, 1965, and March 1, 1966. The original agreement specified that the annual minimum quantity of gasoline to be purchased was 810,000 gallons, but this was reduced to 701,000 gallons in the 1966 agreement. The agreements specified that they were terminable by either party on 60 days' notice at the end of the five-year "primary term" or on any subsequent anniversary date of the agreements.



retail gasoline service stations in the Sheboygan area. Three of those were financed through a plan offered by Skelly to its jobbers. Plaintiffs' complaint describes this financing arrangement as

> "a base lease for a term of fifteen (15) years running from plaintiff, MARPAT, to defendant, SKELLY, the rentals on which base leases are assigned to the financing source,[4] coupled with a sub-lease from defendant, SKELLY, to plaintiff MAGNUS also for fifteen (15) years but each such sub-lease being subject to an earlier termination by SKELLY should MAGNUS purchase less than 100,000 gallons annually of Skelly branded gasoline for resale at that respective service station" (Par. 16 of the complaint).

Skelly's rent under the base lease thus secured Magnus' obligation to the lender. According to plaintiffs, the sublease and obligation to purchase 100,000 gallons of gasoline annually from Skelly could not be terminated by Magnus even if Marpat paid off the entire amount due for the purchase of a station. Additionally, plaintiffs produced testimony that termination of the "Franchise Sales Agreement" would make the entire amount due on the service stations payable in 60 days, but would not terminate the sub-lease and purchase obligation. Plaintiffs also asserted at trial that it is an industry-wide practice for branded oil companies to refuse to franchise jobbers or to finance branded stations if the franchisee still has a contract in force with another company. The Skelly-designed leases, considered in the context of the franchise agreements and the industry-wide "single distributorship" practice, allegedly violated Section 1 of the Sherman Act and Section 3 of the Clayton Act.

Plaintiffs assert that in 1970 Skelly refused to permit them to cancel the base leases and that Skelly terminated plaintiffs' distributorship on February 28, 1973, supposedly in furtherance of its then current desire to withdraw from marketing in Wisconsin. Plaintiffs

[4] The "financing source" referred to was Skelly for one of the service stations and a bank for the other two.

charge that defendant's violations of the antitrust laws prevented them from distributing branded petroleum products of any other oil company. In addition to damages, plaintiffs sought declaratory and injunctive relief.

In March 1976, the district court denied defendant's pretrial motion for summary judgment based on the statute of limitations. In November 1976, after a ten-day trial, a jury awarded plaintiffs $185,000 in damages before trebling, and judgment was accordingly entered in plaintiffs' favor in the amount of $555,000, plus costs and reasonable attorney fees as provided in Section 4 of the Clayton Act.[5] Skelly's post-trial motions were denied in January 1978. In the accompanying opinion Judge Gordon held that the evidence could reasonably be interpreted to show that the three franchise sales agreements between Magnus and Skelly were implemented "so as to include a condition with Magnus not dealing in the gasoline of other suppliers" in violation of the exclusive dealing prohibition contained in Section 3 of the Clayton Act.[6] The district judge pointed out that the jury could have concluded that numerous other jobbers in the relevant market[7] were parties to financing arrangements with Skelly and were precluded from becoming jobbers for other suppliers, thus showing at least a potential lessening of competition under Section 3.

The district court also concluded that there was ample evidence from which the jury could have found that (1) the object of the financing arrangements between Skelly and its jobbers in that area was to restrain trade and (2) those arrangements revealed Skelly's anti-competitive intent in violation of Section 1 of the Sherman Act.[8]

In addition, the court concluded that plaintiffs had shown that they were injured in their "business or property" within the meaning of Section 4 of the Clayton Act[9] because Magnus had demonstrated an attempt to purchase the Jackson Oil Company in Oshkosh, Wisconsin, and to become a Sunray DX franchisee in Oshkosh and Fond du Lac, Wisconsin, but was precluded from

[5] On February 1, 1978, plaintiffs filed a motion for determination of a reasonable attorney's fee for their counsel. The motion was supported by affidavits and a memorandum. Attorney's fees of $45,000 were subsequently awarded, so that the total judgment (stayed during this appeal) for plaintiffs is $600,400 plus costs. The record does not reveal that plaintiffs obtained any additional relief.

[6] Section 3 of the Clayton Act provides in pertinent part:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods * * * or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods * * * of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce" (15 U.S.C. § 14).



[7] The judge noted that there were three different definitions offered of the relevant market. Defendant's expert focused on the 13-county area in southeastern Wisconsin where Magnus purchased gasoline and estimated that Magnus' requirements comprised only .07 to .18 of 1% of that market. A Skelly field representative called as a witness for plaintiffs testified that in the "northern region" of Skelly's distribution system, which includes Wisconsin, there were approximately 40 to 50 financing programs with jobbers similar to the ones with Magnus. In discussing the relevant market, Judge Gordon also referred to testimony about Skelly's finance arrangements *in general*. See 446 F.Supp. at 879.

[8] Section 1 of the Sherman Act provides in relevant part that

> "[e]very contract * * * in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal" (15 U.S.C. § 1).

[9] Section 4 of the Clayton Act provides:

> "Any person who shall be injured in his *business or property* by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee" (15 U.S.C. § 15; emphasis supplied).

doing so by operation of the financing agreements between Magnus and Skelly.

Judge Gordon next found that there was sufficient evidence to support the jury's conclusion that Skelly's actions caused Magnus to lose the Jackson Oil and Sun franchise opportunities.

The district court decided that Magnus' evidence of damages because of its failure to acquire the Jackson Oil Company and to become a Sun franchisee was sufficient and that plaintiffs were not damaged until they were unable to obtain the Jackson Oil Company or a Sun franchise agreement in 1970, well within the four-year statute of limitations contained in Section 4B of the Clayton Act (15 U.S.C. § 15b).

Finally, the district court rejected Skelly's arguments with respect to the instructions and held that a one-month continuance between the close of the evidence and the final arguments did not require a new trial. 446 F.Supp. 874 (E.D. Wis. 1978). Defendant here appeals each of the district court's rulings except those relating to the statute of limitations, the instructions, and the continuance. We reverse.

### I. *No Violation of Section 3 of the Clayton Act*

This part of our opinion will assume *arguendo* that the franchise sales agreements between the parties tended substantially to foreclose competition in the relevant market.[10] Section 3 of the Clayton Act (note 6 *supra*) proscribes sales "on the condition, agreement or understanding" that the purchaser shall not deal in the goods of a competitor of the seller if its effect may be substantially to lessen competition. Plaintiffs contend that the three franchise sales agreements between them and Skelly violated this statute.

The first two agreements required plaintiffs to purchase 810,000 gallons of gasoline annually. In the third agreement, dated March 1, 1966, this amount was reduced to 701,000 gallons. None of the agreements contained an exclusive dealing clause nor required plaintiffs to purchase their total requirements of gasoline from Skelly, nor indeed any gallonage approaching plaintiffs' requirements.[11] The last of these agreements was terminated by defendant effective on February 28, 1971, although Skelly continued to supply Magnus on a month-to-month basis until February 1973.[12] During the years 1964-1971 plaintiffs never purchased anything approaching their requirements from defendant.[13] Because the agreements contained no exclusive dealing clause and did not require plaintiffs to purchase any amounts of gasoline that even approached their requirements, they did not violate Section 3 of the Clayton Act. See *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320; *Standard Oil Co. v. United States*, 337 U.S. 293.

[10] But see Part II *infra*.



[11] There was testimony that the 810,000 gallon minimum specified in the 1964 and 1965 agreements was intended to approximate Magnus' requirements. However, as described in note 13 *infra*, the minimum was reduced in subsequent years while Magnus' requirements had increased, and even in 1964 and 1965 less than two-thirds of Magnus' requirements were purchased from Skelly. In light of these facts, the possibility that the originally specified minimum amounts may have been intended to cover Magnus' requirements is insufficient to form the basis of a Clayton Act Section 3 claim, especially since the damage complained of did not occur until 1970-1971.

[12] Subsequent to the February 1973 termination of their relationship, Skelly continued to supply Magnus with gasoline under the federal voluntary and mandatory allocation programs.

[13] As noted, in 1964 and 1965, the franchise sales agreement required plaintiffs to buy 810,000 gallons of gasoline from Skelly. Nevertheless, in the former year, Magnus bought 840,000 gallons of gasoline but only 568,000 gallons from Skelly. In 1965, plaintiff bought 1,057,000 gallons of gasoline but only 699,000 from Skelly. In 1966 through 1971, plaintiffs were obligated to buy 701,000 gallons per year from Skelly. In each of those years, plaintiffs' total requirements were about 1,000,000 gallons, a large percentage of which was purchased from other suppliers, ranging from 304,000 gallons in 1966 to 566,000 in 1971 (App. 79). Plaintiffs do not claim that the minimum 100,000 gallons per year per financed station to be purchased from Skelly violated the Clayton Act.

While their course of conduct might evince that the parties were violating Section 3 of the Clayton Act, the evidence here contravenes such a course of conduct because the quantity specified in the agreements amounted to less than 60-80 per cent of plaintiffs' total requirements and plaintiffs regularly purchased 30-50 per cent of their requirements from competitors of the seller. Therefore, no illegal course of conduct has been shown under Section 3 of the Clayton Act. *McElhenney Co. v. Western Auto Supply Co.*, 269 F.2d 332, 338 (4th Cir. 1959). Here Skelly cancelled its last franchise sales agreement on December 28, 1970, effective on February 28, 1971, without any proof that it was selling plaintiffs their total requirements.[14]

Although plaintiffs persuaded defendant to reinstate the franchise contract on a month-to-month basis, defendant gave plaintiffs another notice of termination February 28, 1973, because of severe credit problems with plaintiffs even though for the first time plaintiffs had been purchasing virtually their total requirements in 1972 from Skelly. The fact that plaintiffs did buy gasoline only from defendant in 1972 does not further their cause, for their lawsuit is predicated on their 1970-1971 inability to become a Sun distributor and to purchase Jackson Oil Company.[15]

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[14] Some of the reasons for their the cancellation were plaintiffs' delinquent payments and ~~its~~ purchase of less than 40 per cent of its gasoline requirements from Skelly, causing an oversupply situation at Skelly's Granville, Wisconsin, terminal.

[15] After the 1971 termination of the agreement, Skelly supplied Magnus on a month-to-month basis and only for cash in advance. Plaintiffs' theory is that this action by Skelly, taken together with the fact that Magnus purchased 99.6% of its 1972 requirements from Skelly, reveals that the agreements were intended to be exclusive dealing contracts and that they were enforced by Skelly through the threat of cancelling the franchise, which would make the service station debts payable immediately. Plaintiffs assert that the fact that the agreements were not strictly enforced in prior years does not relieve them of their illegality, citing *Advance Business Systems and Supply Company v. SCM Corporation*, 415 F.2d 55 (4th Cir. 1969). However, we think the events of

(Footnote continued on following page)



In sum, during the critical years plaintiffs were handling competitors' gasoline rather than purchasing exclusively from defendant and indeed the franchise sales agreements permitted this, so that Section 3 of the Clayton Act was not violated. *McElhenney Co. v. Western Auto Supply Co., supra*, 269 F.2d at 338; *Davis v. Marathon Oil Co.*, 528 F.2d 395 (6th Cir. 1975).

II. *No Showing of Tendency to Substantially Foreclose Competition in Relevant Market Under Section 3 of Clayton Act*

Even if the franchise sales agreements violated the forepart of Section 3 of the Clayton Act, they would not be illegal unless they tended to substantially foreclose competition between Skelly and its competitors in the relevant market. *Tampa Electric Co. v. Nashville Coal Co., supra*, at 334; *Lupia v. Stella D'Oro Biscuit Co.*, 586 F.2d 1163, 1172 (7th Cir. 1978). As seen on their face and in practice, they did not substantially foreclose competition because in the key years plaintiffs bought large quantities of gasoline from other suppliers. In addition, by plaintiffs' own evidence the retail gasoline market in Sheboygan was highly competitive during the years in question, experiencing numerous "price wars." This suggests that Skelly's competitors were not foreclosed significantly from the retail market in Sheboygan.[16]

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[15] *continued*

1972 do not support an inference that the agreements in force during the relevant years were exclusive dealing contracts in the absence of any evidence that the parties so understood them at the time. It would seem especially anomalous that Skelly should terminate the relationship entirely in February 1973 immediately after it had accomplished its asserted goal of requiring Magnus to purchase virtually exclusively from Skelly. Its action in doing so supports the inference that both the 1973 and 1971 terminations were on account of plaintiffs' credit difficulties.

[16] When discussing the local market, plaintiffs sometimes seem to suggest that the important measure is the extent to which Skelly's competitors were foreclosed from distributing to Skelly jobbers, whereas at other times they focus on

(Footnote continued on following page)

Defendant put on evidence that the retail gasoline market in Wisconsin became more competitive between 1964-1974, with Skelly's share decreasing slightly between 1964-1971.[17] Finally, the plaintiffs failed to show and the district judge did not define what the relevant market consisted of. Thus the trial court, without selecting any, referred to three possible relevant markets: (1) the 13-county area in southeastern Wisconsin where plaintiffs bought their gasoline; (2) the northern region of defendant's distribution system; and (3) defendant's entire sales area (note 7 *supra*).

The district court did not require plaintiffs to define the relevant market because it took out of context a statement in *Lessig v. Tidewater Oil Co.*, 327 F.2d 459,

[16] *continued*
foreclosure of these competitors at the retail level. Since jobbers are independent wholesalers, and since there appears to have been no significant foreclosure of competition at the local retail level, it seems that either there was no significant foreclosure in the relevant geographic market at the jobber level or that there were alternative means of distribution available. At least, this is what we must conclude in the absence of evidence to the contrary.

[17] Plaintiffs' counsel sometimes appeared to be suggesting that an exclusive dealing contract could be illegal under Section 3 of the Clayton Act simply because it foreclosed the purchaser's ability to seek out competing sellers, without any showing of a possibility of a significant foreclosure of competition among the competitors of the seller. To the extent this theory is applied to the franchise sales agreements, it is not supported by the evidence. As already described, Magnus' freedom to purchase from other suppliers was not drastically curtailed.

However, plaintiffs also contend that the combination of the franchise sales agreements, the financing agreements, and the industry practice of sole distributorships curtailed its freedom to change distributors for the duration of the 15-year term of the financing agreements. While such a deprivation of a purchaser's freedom apparently will confer standing on him to sue under Section 3 of the Clayton Act, the case law is clear that to recover he must show a potential foreclosure of competition to the competitors of the seller. *Standard Oil Company v. United States; Tampa Electric Co. v. Nashville Coal Co.*, both *supra*. This plaintiffs have failed to do.



468 (9th Cir. 1964), certiorari denied, 377 U.S. 993, that the requisite substantial lessening of competition "may appear from facts other than the proportion of total commerce in the relevant market which is subject to restraint." But in *Lessig* plaintiff established that the relevant market consisted of eight Western states, that the defendant sold 6.5% of the gasoline in that market, and that through the challenged exclusive dealing contracts the defendant controlled 5% of the retail gasoline sales in the market.[18] *Tampa Electric, supra*, and *L. G. Balfour Co. v. Federal Trade Commission*, 442 F.2d 1 (7th Cir. 1971), clearly hold that the relevant market must be established in a case based on Section 3 of the Clayton Act.

On appeal, plaintiffs have pursued their arguments with regard to three different markets, but we find the evidence insufficient to support an inference that competition among Skelly's competitors could have been significantly impaired in any of them. First, plaintiffs assert that in the "northern region" of Skelly's distribution system "Skelly jobbers numbered between 140 and 150, among whom there were 40 to 50 separate such lease/sub-lease arrangments" (Br. 19). This is insufficient to show potential market foreclosure for at least three reasons: (1) there is no description of what area comprises the northern region and why that is the relevant market, (2) since one jobber may have more than one financing agreement,[19] plaintiffs' statistics tell us nothing about what proportion of the jobbers or what proportion of the retail outlets were assertedly prevented from seeking other suppliers, and (3) there is

[18] The *Lessig* court noted that the only evidence not available was what percentage of retail outlets in the market were subject to the exclusive dealing contracts. It concluded that the more relevant figure was the portion of retail gasoline sales (in gallonage terms) which was subject to the challenged agreements. Thus the relevant market information was before the *Lessig* court.

[19] Plaintiffs, of course, had three such agreements, and some jobbers apparently had as many as 8 or 10 financing agreements with Skelly.

no evidence of what Skelly's share of the relevant market was, so that even if it were possible to ascertain the proportion of Skelly outlets that were foreclosed,[20] it would still have been impossible to evaluate the impact of the foreclosure of those outlets on Skelly's competitors.[21]

Second, plaintiffs allege that the restrictive agreements complained of are company-wide and industry-wide, thus supporting an inference that collectively they must have foreclosed competition. The evidence of company-wide policy was that of 760-800 Skelly jobbers nation-wide, approximately 200 were estimated to have Skelly financing agreements. It was impossible to estimate the amount of Skelly gasoline sold through Skelly-financed stations.[22] Since we have already concluded that plaintiffs failed to establish that the franchise agreements precluded jobbers from purchasing from Skelly's competitors, the only remaining question would be whether, as plaintiffs allege, the inability of jobber-retailers to change distributors because of the financing agreements potentially foreclosed competition significantly. To determine that, however, we would need to know the proportion of retail gasoline sales foreclosed by the Skelly financing

[20] Plaintiffs appear to assume that it is sufficient to show that the amount of market foreclosure was substantial in absolute terms. However, *Tampa Electric Company*, 365 U.S. 320, 329, made it clear that substantiality must be assessed on a comparative basis.

[21] Defendant introduced evidence tending to show that any foreclosure of its competitors would be *de minimis*. Skelly had about 0.60% to 0.71% of the national market for gasoline in the relevant years. It distributed its gasoline in 17 states, and its portion of the market in each of these states in 1971 ranged from 1.24% (Illinois) to 6.47% (Kansas). It had approximately 2% of the Wisconsin market during the relevant years.

[22] The gasoline purchased by Skelly jobbers who participated in the financing program was sold not just to the financed stations, but also "through commercial accounts, industrial accounts, through service stations that [they do] not own, for bulk plants, to farm accounts, et cetera, et cetera" (Tr. 653).



agreements.[23] Plaintiffs failed to introduce such evidence, and the inferences that could be drawn from the statistics that are in evidence suggest that the impact on Skelly's competitors would be negligible. With regard to industry-wide practice, plaintiffs introduced testimony that many branded gasoline distributors had financing programs and single-distributor policies similar to Skelly's. However, none of the evidence offered, including that excluded by the district court, purported to establish the share of the gasoline sales foreclosed by such arrangments.[24] There simply were no facts from which a potential foreclosure of a significant amount of competition could be inferred from the evidence of company-wide or industry-wide practice.

The third market plaintiffs describe is the greater Sheboygan area. Plaintiffs were the third largest of twelve jobbers in the greater Sheboygan area and supplied 10 of the 88 service stations in that area. Even if, as plaintiffs insist, the relevant market for retail gasoline sales is the "community," it does not follow that the "community" is the relevant market to ascertain foreclosure of Skelly's competitors (many of whom were regional or national brands).[25] In addition, the evidence does not establish that Skelly's competitors were

[23] This would presumably be less than the amount of gasoline sold by Skelly-financed stations, since plaintiffs' agreements, for example, committed them to selling 100,000 gallons of Skelly gasoline through each station, whereas the requirements of each were approximately 120,000 gallons per station. Assertedly plaintiffs' agreement was typical, so that one could estimate that approximately 80% of retail sales of Skelly-financed stations were, according to plaintiffs' theory, foreclosed to Skelly's competitors.

[24] In this respect the evidence falls far short of that in *Standard Oil Company v. United States*, 337 U.S. 293, where it was established that the defendant controlled 6.7% of the relevant market through exclusive dealing contracts and that its six leading competitors controlled 42.5% of the market through similar contracts.

[25] Nor does it follow that foreclosure from part or all of plaintiffs' business could substantially impair the competitive position of Skelly's competitors. See note 16, *supra*.

foreclosed even from the greater Sheboygan area since (1) as indicated, plaintiffs bought a significant portion of their requirements from Skelly's competitors, (2) only three of the ten stations supplied by plaintiffs were subject to the financing agreements, and (3) there was evidence of vigorous inter-brand competition in Sheboygan. Thus none of plaintiffs' theories of possible competitive foreclosure is supported in the record.

The defendant's evidence did show that the 13-county area within a 62-mile radius from Sheboygan was the relevant market and that plaintiffs had less than 1% of that market in each of the years involved, so that the franchise sales and financing agreements would at most foreclose a *de minimis* volume of competition. That would not suffice to activate Section 3 of the Clayton Act. *Tampa Electric Co., supra* at 333-335.

III. *No Violation of Section 1 of the Sherman Act*

The complaint in this case does not make any charges that would amount to a *per se* violation of Section 1 of the Sherman Act, and the Supreme Court's recent decision in *Continental TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, evinces judicial reluctance to extend *per se* rules under that statute. Therefore, these plaintiffs had the burden of showing that any arrangements between plaintiffs and defendant unreasonably restrained trade. We conclude that plaintiffs have not satisfied the rule-of-reason standard that governs here.

The district court held that Section 1 of the Sherman Act was violated by defendant because the jury could have concluded that the object of the financing arrangements between the parties was to restrain trade. 446 F.Supp. at 880. We cannot agree because the financing arrangements covering the three stations only required them to purchase 100,000 gallons of gasoline annually from defendant. These amounts were *de minimis* in view of plaintiffs' total requirements for gasoline. See note 13 *supra*. Even if the financing agreements were a means of preventing plaintiffs from cancelling the franchise agreements, they would still have to show that



the foreclosure of the amounts specified in the franchise agreements constituted an unreasonable restraint of trade. Just as there was no showing of a potentially substantial adverse effect on competition under Section 3 of the Clayton Act, the requisite evidence to show that under Section 1 of the Sherman Act the effect upon competition in the market-place was substantially adverse is also fatally lacking. See *Lee Klinger Volkswagen v. Chrysler Corp.*, 583 F.2d 910, 914-915 n. 6 (7th Cir. 1978).

As shown earlier, the district court did not determine the relevant market although defendant's expert witness testified that it consisted of the 13 counties within 62 miles of Sheboygan. He testified that even if that market were halved and even if all plaintiffs' requirements for gasoline were foreclosed by defendant to its competitors, the effect would still be less than 1% of the market. This means that defendant's arrangements must be considered reasonable under Section 1 of the Sherman Act. *United States v. Columbia Steel Co.*, 334 U.S. 495, 508, 511; *Tampa Electric v. Nashville Coal Co.*, 365 U.S. 320, 334-335.[26] As discussed at length *supra*, plaintiffs have presented no credible evidence of an adverse effect on competition. Because plaintiffs failed to show that defendant's financing arrangements substantially foreclosed its competitors in a relevant market, no unreasonable restraints have been demonstrated.

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[26] Plaintiffs' witness, Dr. Allvine, testified in the abstract that defendant's arrangements were unreasonable, but his testimony was without reference to any relevant market and therefore was insufficient to show a violation of Section 1 of the Sherman Act. *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230 (3d Cir. 1975).

Since plaintiffs have not proven that defendant violated Section 3 of the Clayton Act or Section 1 of the Sherman Act, we need not consider whether they have failed to show that they were injured because of a violation of the antitrust laws and whether their claimed damages were too speculative to support the judgment. The district court's judgment is reversed with directions to enter judgment for defendant notwithstanding the verdict.[27]

A true Copy:

Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit*

[27] Our holding is not based on the absence of evidence on the details of exclusive dealing arrangements of Skelly's competitors. And even if the district court should have considered defendant's competitive price allowance program (the giving of price rebates on gasoline sold to a jobber who had been forced by retail price wars to reduce his sale price), that pricing formula has not been shown to violate Section 3 of the Clayton Act. Therefore plaintiffs' cross-appeal is dismissed.



UNITED STATES DISTRICT COURT
E. D. WISCONSIN

No. 73-C-355.

Jan. 18, 1978.

MAGNUS PETROLEUM COMPANY, INC., and Marpat Corporation, *Plaintiffs,*

v.

SKELLY OIL COMPANY, *Defendant.*

Walter, Hopp & Hodson, by Eugene F. Hodson, Sheboygan, Wis., for plaintiffs; Irving I. Saul, Dayton, Ohio, of counsel.

Quarles & Brady, by W. Stuart Parsons, Milwaukee, Wis., for defendant.

## DECISION AND ORDER

MYRON L. GORDON, District Judge.

### I. Introduction

This is an antitrust case brought under § 1 of the Sherman Act and § 3 of the Clayton Act. After a nine-day jury trial, a general verdict was returned in favor of the plaintiffs in the amount of $185,000. Judgment was entered in the amount of $555,000, treble the amount of the verdict, pursuant to 15 U.S.C. § 15, plus attorney's fees and costs.

The defendant Skelly Oil Company has filed a motion for judgment notwithstanding the verdict or for a new trial. This motion has been comprehensively briefed by the parties. I find that the motion should be denied.

The plaintiff Magnus Petroleum Company is a Wisconsin corporation with its principle place of business in She-

boygan, Wisconsin. Magnus Petroleum distributes petroleum products, while the plaintiff Marpat Corporation purchases and leases real estate equipment in connection with the distribution of such products. Arthur P. Magnus owns and controls both of the plaintiff corporations. (Mr. Magnus and Magnus Petroleum may both be referred to herein as Magnus).

The defendant Skelly Oil Company is a Delaware corporation with its principal place of business in Wisconsin. It sells petroleum products in seventeen states including Wisconsin.

Central to this litigation are the mechanics and operation of certain agreements between the parties regarding three service stations operated by Magnus in Sheboygan. In 1964, 1965, and 1966, Magnus and Skelly entered into three separate "franchise sales agreements" in which Skelly agreed to deliver and Magnus agreed to buy specified quantities of gasoline, intermediate oils, antifreeze, lubricating oils, and grease. The 1966 franchise sales agreement was to remain in effect from March 1, 1966, until February 28, 1971. That agreement provided that Magnus purchase from Skelly 701,100 gallons of gasoline and 768,600 gallons of intermediate oils each year.

In addition, the parties entered into transactions in 1964 and 1966 for the financing of three service stations operated by Magnus in Sheboygan. The pertinent undisputed features common to all of these transactions are as follows: Marpat borrowed money from a lender, giving in return its promissory note payable in 15 years. Marpat then gave Skelly a 15-year lease on a service station in return for rental payments from Skelly equal to the payments owed by Marpat to the lender on the note. This was known as the "base lease." Marpat assigned the rental payments from Skelly as security for the promissory note. Skelly in turn sub-leased the service station to Magnus



Petroleum for a 15-year term for the same rental payments as those owed by Skelly to Marpat under the terms of the base lease. The Skelly-Magnus transaction was known as the "sub lease."

**II. Judgment Notwithstanding the Verdict**

A motion for judgment notwithstanding the verdict should not be granted unless the plaintiff has failed to present a prima facie case. *Hallmark Industry v. Reynolds Metals Co.*, 489 F.2d 8, 13 (9th Cir. 1973).

The court of appeals for the seventh circuit has set forth the following test against which the defendant's motion for judgment notwithstanding the verdict must be judged:

> "The motion is properly denied where the evidence, along with all inferences to be reasonably drawn therefrom, when viewed in the light most favorable to the party opposing such motion, is such that reasonable men in a fair and impartial exercise of their judgment may reach different conclusions." ***Funk* v. *Franklin Life Insurance,*** 392 F.2d 913, 915 (7th Cir. 1968).

Cognizant of this standard, I proceed to a consideration of the issues raised by the defendant's motion for judgment notwithstanding the verdict.

A. *Clayton Act § 3*

Section 3 of the Clayton Act, 15 U.S.C. § 14, provides in part:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods . . . or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall

> not use or deal in the goods, . . . of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

The defendant urges that the evidence in this case failed to demonstrate the existence of an express or implied "condition, agreement or understanding that the lessee or purchaser . . . not use or deal in the goods . . . of a competitor. . ." The plaintiffs respond by contending that the evidence showed that Skelly did "discount from, or rebate upon" the price of gasoline sold to Magnus "on the condition, agreement or understanding" that Magnus not purchase gasoline from other sellers. The plaintiffs point to exhibit 61 showing that in 1969 Magnus purchased 700,500 gallons of gasoline from Skelly and 510,982 gallons from other sellers; and to exhibit 62, purporting to show Skelly's decision thereafter to require Magnus to purchase the same number of normally-priced gallons as price protected gallons from Skelly. According to the plaintiffs, this Skelly policy meant that Magnus would have to purchase all his requirements of gasoline solely from Skelly and that competition in the Sheboygan retail gasoline market would probably be lessened substantially thereby.

Skelly claims that the plaintiffs should not be permitted to assert this theory for the first time at this stage of the litigation. I find this contention well taken. The plaintiffs' current argument as to the Clayton Act violation in this case was not set forth in the complaint or advanced at trial, and it accordingly should not be considered on this motion.

It does not follow, however, that the plaintiffs failed to sustain their burden of showing at trial the existence of an exclusive dealing arrangement. The evidence viewed in a light most favorable to the plaintiffs may reasonably be



interpreted to show that the parties' franchise sales agreement was implemented so as to include a condition that Magnus not deal in the gasoline of other suppliers.

The defendant advances a number of arguments in opposition to such a conclusion. It contends that the franchise sales agreements were not mentioned in the complaint and therefore may not be considered in determining whether any violation of the antitrust laws occurred. In view of the complaint's several references to the "various leases, sub-leases, and financial instruments," I am unpersuaded by the latter argument.

The defendant also points to exhibit 418, which shows that in 1970 and 1971 Magnus purchased gasoline from sellers other than Skelly. Such evidence is not, however, inconsistent with other evidence showing Magnus was under great pressure to purchase all of his requirements of gasoline from Skelly Oil. Elmer J. Peterson, a Skelly territorial representative for an area including Wisconsin, stated by deposition that if a Skelly jobber consistently purchased substantial quantities of product from other sellers, the jobber would be asked to sign a mutual cancellation of his franchise. If the jobber were unwilling to do so, Mr. Peterson would recommend that the jobber's franchise be cancelled on 60 days' notice. Moreover, there was testimony by Denzel Luke, a Skelly field representative, that the Magnus franchise was eventually continued on only a month-to-month basis so that Mr. Magnus would be persuaded to increase his purchases of Skelly products. Following the conversion to a month-to-month arrangement, Magnus did, in 1972, purchase virtually all of his gasoline requirements from Skelly Oil.

Such evidence, in my opinion, charts "an extrinsic course of conduct from which the illegal condition or understanding" could have been found in this case. *McElhenney Co. v. Western Auto Supply Co.*, 269 F.2d 332, 338 (4th Cir. 1959).

Skelly attacks this view of the evidence by offering other explanations which assertedly are more plausible and which also find support in the record. For instance, Skelly claims that in 1972 Magnus bought considerably more gasoline from it than from other suppliers because of the advent of an oil shortage. Also, Skelly urges that Magnus was relegated to a month-to-month status because of his poor past credit record. However, I conclude, after considering the evidence and the inferences to be drawn therefrom in a light favoring the plaintiffs, that the jury could reasonably have decided that the parties' agreement contained an implied condition that Magnus not deal in the product of other suppliers.

In order to establish a violation of § 3 of the Clayton Act, the plaintiffs also must show that the effect of the "condition, agreement or understanding" to refrain from dealing in goods of another seller "may be to substantially lessen competition . . . in any line of commerce."

It has been held that this aspect of § 3 will be satisfied by "specific evidence of market foreclosure in a relevant market in which the exclusive contracts exist." *L. G. Balfour v. FTC*, 442 F.2d 1, 19 (7th Cir. 1971); *Tampa Electric v. Nashville Coal*, 365 U.S. 320, 327-9, 81 S.Ct. 623, 5 L.Ed.2d 580 (1961). However, there is also authority for the proposition that

> ". . . knowledge of the share of the market foreclosed is not invariably required to determine whether exclusive dealing arrangements violate Section 3 of the Clayton Act. The test remains whether the jury can find from all the circumstances that the effect of the particular arrangements 'may be to substantially lessen competition or tend to create a monopoly in any line of commerce; and, as the Clayton Act tying clause cases demonstrate, this may appear from facts other than the proportion of total commerce in the relevant market which is subject to restraint."
>
> *Lessig v. Tidewater Oil Co.*, 327 F.2d 459, 468 (9th Cir. 1964).



Skelly contends that the plaintiffs have failed to present evidence of a relevant market and of the probable effect on competition of the agreements involved in the instant action. The market definition presented by Skelly assertedly showed that the operation of the Magnus-Skelly agreements would probably effect a minimal, not a substantial, lessening of competition on that market.

Under the lease agreements and financial arrangements, if Magnus wished to terminate his relationship with Skelly as a Skelly jobber, he would have to obtain within 60 days the funds to pay off the balance of the 15-year mortgages. However, Skelly would not thereupon release the stations to the jobber. Rather, if Magnus elected to continue operating the stations, he would be obligated to continue to purchase annually the lesser of 100,000 gallons, or 50% of his yearly volume, of gasoline. As is more fully described below, Magnus claimed in this action that by operation of these provisions of the parties' agreements, he was foreclosed from purchasing the Jackson Oil Company and from becoming a jobber for Sunray DX.

The defendant's expert, Bruce Caputo, proposed that the relevant market was the 13-county area in southeastern Wisconsin where Magnus purchased gasoline. Mr. Caputo testified that Magnus total requirements for gasoline comprised anywhere from .07 to .18 of 1% of that market during the years 1964 to 1975. Skelly contends that the probable lessening of competition over such a percentage of the relevant market would necessarily be insubstantial.

In addition to Mr. Caputo's definition of the relevant market, Denzel Luke testified that in 1968 Skelly had between 140 and 150 jobbers in the "northern region," an area including Wisconsin. Among these jobbers there were approximately 40 to 50 separate financing programs in-

volving lease and sublease arrangements. There also was testimony by Fred C. Allvine and Wayne A. Dirks from which the jury could have inferred that under Skelly's finance arrangements in general, the service station leases were non-cancellable at Skelly's option even if the balance of the outstanding mortgage were tendered within 60 days by the jobber. Furthermore, Maurice B. Holdgraf testified that a prospective supplier of a jobber would not permit that jobber to maintain a "dual distribution," that is to purchase product from suppliers of two different brands of gasoline.

According this evidence the favorable inferences to which it is entitled on this motion, the jury could have concluded that numerous other jobbers in the relevant market who were parties to financing arrangements with Skelly were precluded by the above-described terms of those arrangements from becoming jobbers for suppliers of other brands of gasoline. The jury could have concluded that the effect of all such financial arrangements in the relevant market may have been to substantially lessen competition. Such a lessening of competition need be only potential, not actual. *Standard Oil Co. v. United States,* 337 U.S. 293, 314, 69 S.Ct. 1051, 93 L.Ed. 1371 (1949).

B. *Sherman Act § 1*

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in part that "[e]very contract . . . in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." Skelly contends that § 1 proscribes only unreasonable restraints of trade and that no evidence of any such restraint on any relevant market was presented at trial. Skelly also argues that an intent to restrain trade alone, without a concomitant showing of actual restraint, does not violate § 1 of the Sherman Act.



Turning first to Skelly's second argument, there are cases indicating that both the object and the effect of a restraint must be considered in determining whether a violation of § 1 has occurred. *American Motor Inns, Inc. v. Holiday Inns, Inc.,* 521 F.2d 1230, 1246-8 (3rd Cir. 1975); *Twin City Sportservice, Inc. v. Charles O. Finley & Co.,* 512 F.2d 1264, 1275 (9th Cir. 1975); *Jewel Tea Co. v. Local Unions,* 274 F.2d 217 (7th Cir. 1960). However, it has also been held that "contracts may . . . be banned by § 1 if unreasonable restraint was either their object or effect." (emphasis supplied). *Times-Picayune v. United States,* 345 U.S. 594, 614, 73 S.Ct. 872, 883, 97 L.Ed. 1277 (1953); accord, *Cities Service Oil Co. v. Coleman Oil Co.,* 470 F.2d 925, 930-1 (1st Cir. 1972). Applying the latter standard, a violation of § 1 of the Sherman Act may be found in the case at bar.

There was ample evidence from which the jury could have concluded that the object of the financing arrangements was to restrain trade. Skelly contends that its desire to secure and maintain representation in an area may not be viewed as an intent to restrain trade. Based on previously mentioned testimony about the operation of the financing arrangements, wherein Skelly required a jobber who wished to terminate his relation with Skelly to satisfy the balance of the mortgage obligation within 60 days and continue to purchase substantial quantities of gasoline each year, the jury could have concluded that Skelly had not a "wish to maintain representation" in an area, but instead an intent to restrain trade in the relevant market described in the prior discussion of the Clayton Act.

C. *Damages*

1. *Injury to business or property*

15 U.S.C. § 15 permits any person injured in his "business or property" by a violation of the antitrust laws to

recover treble damages therefor. Skelly claims that Mr. Magnus did not sustain injury to his "business or property" within the meaning of that statute.

The plaintiffs contended at trial that the above-described financing arrangements in effect between Magnus and Skelly precluded Magnus from terminating his position as a Skelly jobber or from taking the service stations and becoming a jobber for another oil company. This was true because Skelly would refuse to release the leases even on a jobber's payment of the entire balance due on the mortgage within 60 days of notice of termination. In addition, Skelly would require the jobber to continue to purchase a significant quantity of gasoline, as already described, after terminating the Skelly-jobber relationship.

Mr. Magnus claims that by operation of the financing arrangements, he was precluded from becoming a jobber for Sunray DX and that he was unable to purchase the Jackson Oil Company. Skelly argues that an expectation or hope to enter business for Sunray DX or to purchase the Jackson Oil Company does not meet the requirement of an injury to business or property under 15 U.S.C. § 15.

It is not necessary actually to obtain or operate the business in question in order to maintain a suit for injury to such business under the statute. An attempt to enter a business is sufficient if both (1) an intention and (2) preparedness to enter the business are shown. *Martin v. Phillips Petroleum Co.*, 365 F.2d 629, 633 (5th Cir. 1966).

It would appear that the evidence amply demonstrates Magnus' intent to purchase the Jackson Oil Company and to become a Sun franchisee. Magnus contacted, and was contacted by, persons interested in accomplishing these transactions. Certain negotiations ensued. This is sufficient to demonstrate Magnus' intent. *Martin v. Phillips Petroleum Co.*, supra.



Wtih respect to Jackson, Skelly argues that Magnus did not have the financial capacity to purchase the concern. As to Sun, Skelly claims that because Magnus never informed it of his offer from Sun or broached the possibility of paying the balance owing on the mortgages in return for a release of the leases, the plaintiffs have not demonstrated either their intent or their preparedness to become a Sun jobber.

The plaintiff's ability to finance the business, the consummation of contracts, affirmative steps to enter the business, and prior background and experience in the business are all factors to be considered in determining whether a plaintiff has shown himself prepared to enter a business under 15 U.S.C. § 15. *Martin v. Phillips Petroleum,* supra, 633, 634.

The testimony shows that Magnus had considerable prior experience in the operation of service stations and in the sale of petroleum products. Moreover, as stated above, Magnus did take affirmative steps to arrange the acquisition of Jackson and to become a Sun franchisee. Most importantly, the testimony of Messrs. Holdgraf and Luke and the deposition of Mr. Peterson to the effect that dual distribution jobberships were disfavored by supplier oil companies gives rise to the inference that Magnus could have been precluded from entering other businesses, not because of a lack of intention or preparedness on his part, but because of the terms under which Magnus would be permitted to terminate his Skelly jobbership. Although Skelly points to evidence of Magnus' financial inability to purchase Jackson and of his failure to ask Skelly about the possibility of releasing the leases, I believe that these are simply factors which the jury was entitled to consider, along with the others set forth above, in determining whether Magnus did demonstrate an attempt to enter the two businesses and thus incurred an injury to his "business" under the statute.

2. *Causation*

The plaintiffs had the burden at trial of demonstrating a casual relationship between their damages and Skelly's actions. *Copper Liquor, Inc. v. Adolph Coors Co.,* 509 F.2d 758, 759 (5th Cir. 1975); *Story Parchment Co. v. Paterson Co.,* 282 U.S. 555, 563, 51 S.Ct. 248, 75 L.Ed. 544 (1931). Skelly argues that Magnus' damages may not be attributed to it because Magnus never offered to terminate the agreements, and that if he had so offered, the service stations would have reverted to him regardless of Skelly's position on the matter because the parties' agreements amounted to a mortgage. Skelly also claims that it did not cause Magnus' damages because Sun had reasons of its own for not making Magnus their franchisee.

In *Milwaukee Towne Corp. v. Loew's, Inc.,* 190 F.2d 561, 566-568 (7th Cir. 1951), the court ruled that the plaintiff was barred from recovering damages under the antitrust laws for the defendants' failure to provide him with first-run motion pictures for his then second-run motion picture theater in the absence of a request for such motion pictures. Here, Mr. Magnus never asked Skelly whether Skelly would consent to release Magnus, without further obligation, from the financial arrangements, if Sun povided the sum to pay off the balance of the mortgage. Skelly contends that it would have accepted such a request if made because of its continuing credit difficulties with Magnus. However, Mr. Magnus testified that after he attempted to cancel his jobbership with Skelly in 1968, he rescinded such cancellation after Skelly's Mr. Terwilliger informed him of the agreements' provisions, already described, which would become effective on termination. In 1970 and 1971, during the period of his negotiations with Sun, Mr. Magnus testified that he asked Mr. Terwilliger whether Skelly's policy of refusing to release the leases and requiring continued annual purchases of gasoline had changed. Mr. Terwilliger responded that the policy had not changed. Mr. Magnus also stated that he was afraid to tell Skelly in specific terms of his negotiations with Sun because of what he considered the real possibility that Skelly would thereupon terminate his franchises.



It is apparent from the above-summarized testimony that the situation presented by this case may be distinguished from that set forth in *Milwaukee Towne Corp.,* supra. Here Magnus made inquiries on a number of occasions in order to ascertain Skelly's policy on termination of his jobberships. Although Skelly claims that it would have agreed to a termination, it did not suggest that to Mr. Magnus when he made his inquiries in 1968 and in 1970 or 1971. The jury was entitled to consider the nature of Mr. Magnus' inquiries and his reasons for refraining from disclosing potential business opportunities to Skelly personnel in deciding whether Skelly's actions resulted in Mr. Magnus' inability to become a Sun franchisee.

I find Skelly's argument that the agreements were actually a mortgage, such that the service stations would necessarily have become Magnus' property on satisfaction by him of the underlying debt, of minimal relevance. There is ample evidence demonstrating that neither Magnus nor Skelly viewed the agreements in that fashion while such agreements were in effect. Nothing in the agreements or in their implementation by Skelly would have suggested such a possibility to Magnus during his negotiations with Jackson or Sun.

Although there was evidence that Sun at one time was not interested in acquiring Wisconsin jobbers, there was also evidence that this policy was not in effect at all times pertinent to the Magnus-Sun negotiations. Moreover, there was evidence that Sun was dissuaded from concluding an agreement with Magnus because the Magnus-Skelly leases and financing agreements obligated Magnus to purchase gasoline from Skelly even after full payment of the underlying debt. The evidence showed that dual distributorships

were shunned by companies seeking prospective franchisees. The jury could properly have concluded, on a consideration of all of this evidence, that Skelly's actions, not Sun's, caused Magnus to lose the Sun franchise opportunity.

3. *Nature of the evidence of damages*

At trial, Magnus presented evidence of lost profits for the period March 1, 1971, to September 30, 1976, and lost good will because of the failure to acquire the Jackson Oil Company and to become a Sun franchisee. In order to show lost profits as to Jackson, the plaintiffs' expert, Neil Vanderjagt, obtained an annual profit figure for Jackson from the company's 1969 tax return, divided that figure by 12, and then multiplied it by 67 (the number of months from March 1, 1971, through September 30, 1976). Lost profits as to Sun were computed by determining that Sun handled about 1.2671 times more gallons of gasoline annually than did Jackson. That figure was then multiplied by the Jackson lost profits, figure, derived as explained above, to obtain the amount of Magnus' lost future profits by not becoming a Sun franchisee. Mr. Vanderjagt obtained Sun's annual gallonage from exhibit 145, which reflects Mr. Magnus' notes of such gallonage from a conversation he had with Sun's Merle Rossing.

Skelly claims that all damages are speculative because they are based on documents which are either inadmissible or nonprobative of Jackson's and Sun's true financial circumstances. Skelly further attacks the plaintiffs' claimed damages for loss of good will as to Jackson on the ground that the plaintiffs' expert did not subtract therefrom Magnus' cost to obtain Jackson in the first instance.

Skelly particularly urges that Mr. Magnus' notes of a conversation with Merle Rossing (exhibit 145), from which Sun's annual gallonage volume was derived, was hearsay and therefore inadmissible. Contrary to the defendant's assertion, I believe that exhibit 145 was admissible under the business record exception to the hearsay rule, Federal Rules of Evidence 803(6). Skelly contends that the exhibit was not "kept in the course of a regularly conducted business activity" and was untrustworthy, thus making Rule 803(6) inapplicable. In my opinion, Magnus' notes, made in the course of negotiations for a business opportunity, were a part of a regularly conducted business activity. Although the notes were ultimately used in connection with the plaintiffs' damages presentation, it has not been shown that the notes were inaccurate when made by Magnus, or that Mr. Rossing provided Magnus with incorrect infomation.



While it is true that speculative damages may not be recovered, I am unable to hold that the plaintiffs' damages presentation was founded on mere speculation. Damages may be shown "as a matter of just and reasonable inference, although the result be only approximate." *Story Parchment Co. v. Paterson Co.*, 282 U.S. 555, 563, 51 S.Ct. 248, 250, 75 L.Ed. 544 (1931). Although the plaintiffs' loss may have been ascertained by other methods, I cannot say, according all favorable inferences to the evidence presented, that such evidence amounted to nothing more than speculation or guesswork. I note also that during the defendant's thorough cross examination of the plaintiffs' expert regarding the latter's determination of the plaintiffs' damages, many of the points raised on this motion were emphasized. The jury was thereby alerted to the asserted weakness in the plaintiffs' claimed damages.

D. *Statute of Limitations*

Skelly contends that the plaintiffs' action is barred by the applicable statute of limitations contained in 15 U.S.C. § 15b. That section provides in part that "[a]ny action to enforce any cause of action under [15 U.S.C. § 15] . . . shall be forever barred unless commenced within four

years after the cause of action accrued." Citing *Baldwin v. Loews, Inc.*, 312 F.2d 387 (7th Cir. 1963), *Emich Motors Corp. v. General Motors Corp.*, 229 F.2d 714 (7th Cir. 1956), and *Metropolitan Liquor Co., Inc. v. Heublein, Inc.*, 305 F.Supp. 946 (E.D.Wis. 1969), among other cases, Skelly contends that the cause of action in this case accrued in 1964 and 1966 when the contracts were signed or, alternatively, in 1968 when Mr. Terwilliger advised Mr. Magnus of the consequences on termination of the parties' agreements.

In *Zenith Radio Corp. v. Hazeltine Research*, 401 U.S. 321, 339, 91 S.Ct. 795, 806, 28 L.Ed.2d 77 (1971), a case decided subsequent to the decisions on which the defendant relies, the United States Supreme Court stated:

> ". . . it is hornbook law, in antitrust actions as in others, that even if injury and a cause of action have accrued as of a certain date, future damages that might arise from the conduct sued on are unrecoverable if the fact of their accrual is speculative or their amount and nature unprovable. (citations omitted)
> ". . . the cause of action for future damages, if they ever occur, will accrue only on the date they are suffered; thereafter the plaintiff may sue to recover them at any time within four years from the date they were inflicted." (citations omitted)

Although Skelly attempts to distinguish *Zenith Radio* as an antitrust conspiracy case, I find the case's generalized observations about the statute of limitations here involved to be pertinent to the case at bar. At a proceeding in this action on March 1, 1976, I denied Skelly's motion for summary judgment in reliance on *Zenith Radio*. Now that Skelly has raised the identical issue again on the instant motion, I persist in my view that *Zenith Radio* controls.

Applying *Zenith Radio*, therefore, it is apparent that the cause of action accrued on the date that the plaintiffs' damages were inflicted, which is the point at which they became unspeculative and provable. The plaintiffs were not damaged by the defendant's termination policy until they were unable, by merit of that policy, to obtain the Jackson Oil Company or to consummate a franchise agreement with Sun, both of which occurred in 1970. Since the action was filed on July 3, 1973, it is not barred by the four-year statute of limitations.



### III. New Trial

Skelly raises many of the contentions advanced on its motion for judgment notwithstanding the verdict in support of its alternative motion for a new trial. I find those arguments insufficient to justify a new trial, for the reasons previously stated in this memorandum.

With respect to jury instructions, Skelly contends that the plaintiffs' instructions two, seven, seven (c), and seven (d) should not have been given. As to instruction two, I have already ruled, adversely to Skelly, that the franchise sales agreements were properly within the scope of the allegations of the complaint. I believe that instructions seven, seven (c), and seven (d) were properly given, consistent with my prior determination that restraint may be either an object or an effect under § 1 of the Sherman Act.

Skelly also argues that its instructions twelve and fourteen (A) should have been read to the jury. Instruction twelve was not required, since I have already indicated that under the circumstances Mr. Magnus was not obligated to inform Skelly of his prospect with Sun as a necessary prerequisite to recovering damages for that lost opportunity.

The defendant further contends that it was error to omit that portion of instruction fourteen (A) which provided a caution to the jury in its evaluation of the plaintiffs' dam-

ages evidence. I believe that the omission of this portion of the instruction was not error because similar guidelines for the evaluation of damages testimony and expert testimony were given to the jury in instructions fourteen, twenty-two and Devitt and Blackmar § 71.08.

Finally, Skelly argues that the one-month hiatus between the close of the evidence in this action and the final arguments requires a new trial. I note at the outset that both parties were repeatedly warned by me during the course of trial that the case might not be completed because of other matters on the court calendar which also required attention. In spite of these warnings, Skelly did not interpose an objection at trial to the one-month continuance. I am unable to conclude that the continuance affected the defendant's more than it did the plaintiffs' case. I find no special prejudice which accrued only to Skelly because of the regrettable but necessary decision on my part to consider other pressing matters after permitting this civil action to proceed to trial continuously for more than one week.

For the reasons stated in this decision, the defendant's motion for judgment notwithstanding the verdict or for a new trial will be denied.

Therefore, IT IS ORDERED that the defendant's motion for judgment notwithstanding the verdict or for a new trial be and hereby is denied.



UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

Nos. 78-1387, 78-1388

MAGNUS PETROLEUM COMPANY, INC. and
MARPAT CORPORATION,
*Plaintiffs-Appellees, Cross-Appellants,*

vs.

SKELLY OIL COMPANY,
*Defendant-Appellant, Cross-Appellee.*

May 23, 1979

Before Hon. WALTER J. CUMMINGS, Circuit Judge; Hon. ROBERT A. SPRECHER, Circuit Judge; Hon. GEORGE N. LEIGHTON, District Judge*

**Appeal from the United States District Court for the Eastern District of Wisconsin**

**No. 73-C-355**

**Myron L. Gordon, Judge**

**OPINION BY JUDGE CUMMINGS**

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Wisconsin, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, and REMANDED, with directions, in accordance with the opinion of this court filed this date.

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* Honorable George N. Leighton, Judge, United States District Court for the Northern District of Illinois, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

Nos. 78-1387, 78-1388

MAGNUS PETROLEUM COMPANY, INC. and
MARPAT CORPORATION,
*Plaintiffs-Appellees, Cross-Appellants,*

vs.

SKELLY OIL COMPANY,
*Defendant-Appellant, Cross-Appellee.*

June 20, 1979

Before Hon. WALTER J. CUMMINGS, Circuit Judge; Hon. ROBERT A. SPRECHER, Circuit Judge; Hon. GEORGE N. LEIGHTON, District Judge*

**Appeal from the United States District Court for the Eastern District of Wisconsin**

**No. 73-C-355**

**Myron L. Gordon, Judge**

**ORDER**

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by plaintiffs-appellees, cross-appellants, Magnus Petroleum Company, Inc. and Marpat Corporation, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* District Judge George N. Leighton of the Northern District of Illinois is sitting by designation.



UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

No. 73-C-355

MAGNUS PETROLEUM COMPANY, INC.
and MARPAT CORPORATION, *Plaintiffs,*

vs.

SKELLY OIL COMPANY, *Defendant.*

**JUDGMENT**

FILED, JULY 9, 1979

Upon the order and judgment of the United States Court of Appeals for the Seventh Circuit dated May 23, 1979, that the judgment of this Court dated November 4, 1976 be reversed (with costs) and remanded, with directions to enter judgment for the defendant notwithstanding the verdict,

It is ordered and ajudged (sic):

1. The judgment of this Court dated November 4, 1976 that the plaintiffs recover of the defendant the sum of $555,000 as damages, plus reasonable attorney's fees to be determined, and costs as provided by law, is hereby vacated.

2. The order of this Court dated January 18, 1978, denying the defendant's motion for judgment notwithstanding the verdict or for a new trial, is hereby vacated.

3. The order of this Court dated May 31, 1978, that the sum of $45,400 be awarded in favor of the plaintiffs and against the defendant as a reasonable attorney's fee in this action, is hereby vacated.

4. Judgment notwithstanding the verdict is hereby entered for the defendant against the plaintiffs, with costs as

provided by law. The complaint (as amended) is dismissed upon the merits, with prejudice.

Dated at Milwaukee, Wisconsin, this 9th day of July, 1979.

/s/ Ruth W. LaFave
Clerk of Court

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-279

MAGNUS PETROLEUM COMPANY, INC. and MARPAT CORPORATION, *Petitioners*

v.

SKELLY OIL COMPANY, *Respondent*

**On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit**

# BRIEF OF RESPONDENT

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414/277-5000

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

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No. 79-279

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MAGNUS PETROLEUM COMPANY, INC. and MARPAT CORPORATION, *Petitioners*

v.

SKELLY OIL COMPANY, *Respondent*

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**On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit**

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## BRIEF OF RESPONDENT

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### QUESTIONS PRESENTED

1. Under § 3 of the Clayton Act, may a "condition, agreement or understanding" to "not use or deal in the goods . . . of a competitor" be inferred from an eight-year course of dealing where (a) a written franchise sales agreement required purchase and sale of specified minimum quantities; (b) the quantities specified consistently amounted to less than 60-80% of the buyer's total requirements; and (c) the buyer regularly purchased 30-50% of its requirements from competitors of the seller?

2. Can a violation of § 3 of the Sherman Act or § 3 of the Clayton Act be established without definition of a relevant geographic market and without proof that Competition may be (Clayton Act) or is (Sherman Act) substantially lessened in that market by reason of the allegedly violative conduct?

## STATEMENT OF THE CASE

### Skelly Oil Company

Based in Tulsa, Oklahoma, Skelly Oil Company sells petroleum products, including gasoline and heating oil, in 17 states including Wisconsin (Ex. 422). It sells to wholesalers or "jobbers" (like petitioner Magnus Petroleum Company) and also directly to retail service stations some of which Skelly owns and leases to dealers. From 1969 through 1975 Skelly's share of the U.S. market for gasoline ranged from 0.60% to 0.71% (Ex. 422). During the same years, Skelly had approximately 2% of the market for gasoline in the state of Wisconsin (Tr. 687-88, Ex. 420, 421).

Before 1963, when it purchased a bulk plant and three service stations in Sheboygan and one in nearby Elkhart Lake, Skelly had no operations in the Sheboygan, Wisconsin area (Tr. 611-615). Like many oil companies in the 1960's (Tr. 97, 216), Skelly had a "jobber acquisition" program to expand its market share in Wisconsin (Tr. 611-612). By 1963, Magnus Petroleum Company ("Magnus") had become a successful jobber of petroleum products in the Sheboygan area, operating "bulk plant" storage facilities as well as a number of service stations. Skelly sought Magnus' patronage.



### Franchise Sales Agreements (1964-1966)

On February 29, 1964, Magnus and Skelly signed a "Franchise Sales Agreement" (Ex. 175), by which Magnus agreed to buy and Skelly agreed to sell and deliver to Magnus specified annual minimum quantities of gasoline. The "primary term" of this Agreement was March 1, 1964 to February 28, 1969.[1] The annual minimum quantity of gasoline specified in the Franchise Sales Agreement was 810,000 gallons. The parties signed a new Franchise Sales Agreement (Ex. 175) effective March 1, 1965 after Magnus incorporated; its expiration date and purchase obligations remained the same. This was replaced on March 1, 1966 by another Franchise Sales Agreement (Ex. 175), running to February 28, 1971. The specified annual quantity of gasoline was reduced from 810,000 to 701,000 gallons. Other provisions remained the same.

The minimum purchase obligation inserted in the first Franchise Sales Agreement was an estimate of Magnus' actual annual requirement for gasoline (Tr. 406-407).[2] Magnus did not object to the quantities specified (Tr. 220-222). He "thought it was perfectly reasonable that Skelly be obligated to deliver to [him]

[1] Either party could terminate upon 60 days written notice at the end of the five-year "primary term" or as of any "anniversary date" (March 1 of each year) thereafter, or upon 10 days written notice for violation of the agreement by the other party.

[2] The reason for the annual requirement was fully explained at trial. Skelly "[didn't] want to write a franchise for a million gallons and the jobber a year later buy 500,000 gallons." (Tr. 407). Having obligated itself to deliver the quantity specified, Skelly had to arrange for delivery of that quantity to a terminal in Wisconsin; if a jobber purchased less than contracted for, Skelly would have excess product available at the terminal. At least before 1972, this created "a serious problem." (Tr. 1079).

the number of gallons of gasoline specified," and that he "be obligated to purchase from Skelly the quantities specified . . ." (Tr. 223).

In 1964, Magnus bought and sold 840,000 gallons [3] of gasoline (with 810,000 the specified minimum). Although in 1965 Magnus' volume jumped to 1,057,000 gallons, the March 1, 1966 Franchise Sales Agreement dropped the annual minimum purchase obligation to 701,000 (Ex. 175). Magnus' actual requirements continued to range much higher than that, from 996,000 gallons (in 1970) to 1,895,000 (in 1972). Thus, although the first minimum set apparently bore some relation to estimated requirements, thereafter no such relationship existed. From 1964 through 1971 the highest percentage of its total requirements which Magnus purchased from Skelly was 75.9% (1969), with only 54.3% and 39.3% purchased from Skelly in 1968 and 1970, respectively (Ex. 418).[4] Magnus purchased ". . . very substantial amounts from other suppliers" (Tr. 223-225), sometimes because it was "cheaper" (Tr. 232).

**Service Station Financing Program**

In the decade 1960-1970, many oil companies offered service station financing programs to jobbers (or prospective jobbers) in order to increase the number of retail outlets handling their products (Tr. 217-218). Skelly offered a jobber financing program in 1964. Mr.

[3] The gallonages referred to in this paragraph were tabulated in Ex. 418, which is appended to this Brief.

[4] Not even the substantially lower contractual minimums were enforced. In all but four years from 1964 through 1975 Magnus failed to purchase the minimum quantities specified by the Franchise Sales Agreement (Ex. 418, Tr. 235).



Magnus found this program attractive (Tr. 216-217), and Skelly assisted him in financing three Sheboygan service stations, one in 1964 and two in 1966. The amounts loaned were $44,200, $65,000 and $41,500 (respectively). In these transactions a bank (Skelly itself in one case) loaned Marpat Corporation [5] the money in exchange for Marpat's promissory note, payable over 15 years at a favorable rate of interest (Tr. 616). Marpat then leased the station to Skelly for a term of 15 years, with the monthly rent equal to the amortization payments on the note. Marpat assigned the rents due it from Skelly under that "base lease" to the lender as security for the note. Skelly then subleased the station to Magnus for a term of 15 years at the same monthly rent.[6] Thus Skelly's payment to Marpat of rent under the base lease (which was non-cancellable except with the consent of the lender) secured payment of Marpat's promissory note (Exs. 176, 177 and 178).

[5] Magnus was the petroleum product distributing corporation. Petitioner Marpat Corporation ("Marpat") was a holding company formed to purchase and lease real estate and equipment.

[6] The subleases had minimum gallonage requirements of 100,000 per year per station, which did not apply if Skelly cancelled the Franchise Sales Agreement. Actual annual gallonage per station per year (without regard to supplier) averaged approximately 187,500 in 1973 (Tr. 239). Mr. Magnus recalled no instance "of any representative of Skelly complaining or bringing to [his] attention the fact that [he] had failed to purchase the minimum . . ."; that was "never an issue," although there were years in which 100,000 "Skelly" gallons were not put through the stations (Tr. 235-236). In fact, these requirements were unenforceable because gasoline was commingled in the bulk plant (Tr. 242-243). No one could tell how many Skelly gallons were actually sold through each station because all gasoline purchased by Magnus from all suppliers was deposited and mixed in a bulk plant and taken from there to the stations. (*Id.*)

**Termination of the Franchise**

Almost from its inception, the franchise was strained by Magnus' inability to pay when it was supposed to pay for petroleum products delivered (Tr. 246). In 1966, Magnus suffered a loss as a result of its operation of a liquor store business (Tr. 247). Magnus' bank "extended no further credit" and cut the existing line in half (Tr. 247). This "completely damaged [Magnus'] operating capital." (Tr. 248). Magnus "needed that higher credit limit desperately to operate," and, from then on, working capital was "tight" "most of the time." (Tr. 248). It was difficult for Magnus to pay its bills at all (Tr. 248). This resulted in protracted disputes over slow payment and sometimes non-payment of the various accounts involved, and over Skelly's consequently restrictive credit policies.

Unable to resolve these problems, Skelly noticed termination of the franchise effective February 28, 1971 (Ex. 69), but Magnus promised to reform and the franchise was reinstated on a month-to-month basis (Ex. 70, Tr. 1088). The situation changed only briefly. Two years later, "because of severe credit problems," [7] Skelly gave Magnus another notice of franchise termination, effective February 28, 1973 (Tr. 191). Skelly nevertheless continued to supply Magnus with petroleum products under the 1973 federal voluntary allocation program first established by federal legislation [8] on February 1, 1974 (Tr. 191-193, 279-280, 291-293).

[7] Tr. 1089; App. 8a.

[8] Emergency Petroleum Allocation Act of 1973 § 4, 15 U.S.C.A. § 753 (1977).



**Proceedings Below**

This suit was commenced on July 3, 1973. The complaint alleged that Skelly violated the antitrust laws by refusing to permit a cancellation of the "base leases," as a result of which Magnus was allegedly forced in 1970 to forego an opportunity to become a Sun Oil Company jobber in Sheboygan and the Oshkosh-Fond du Lac, Wisconsin area, and to acquire the Jackson Oil Company, another jobbership in a nearby Wisconsin community (Complaint ¶ 19). That was the theory on which the case was tried, beginning September 20, 1976.

Skelly moved for judgment notwithstanding the jury's general verdict ($185,000, before trebling) or, in the alternative, for a new trial. The district court denied the motion. 446 F.Supp. 874 (E.D. Wis. 1978). Skelly appealed, urging four points.

First, it was undisputed that over the eight-year period involved Magnus purchased significant quantities of gasoline from Skelly's competitors,[9] without any attempt on Skelly's part to enforce purchase of the minimum quantities specified in the Franchise Sales Agreement and subleases (let alone Magnus' total requirements). The district court held that the jury could have inferred an exclusive dealing condition in violation of § 3 of the Clayton Act from testimony that Skelly sales personnel urged Magnus not to buy gasoline from other suppliers,[10] and from the fact that in

[9] See Exhibit 418, appended to this Brief.

[10] There was concern in 1970 that Magnus was buying most of its gasoline from suppliers other than Skelly (Ex. 325, Tr. 149-152, 1077-1080). In fact during that year Magnus purchased only 39.3 percent of its gasoline requirements from Skelly (Ex. 418). In

one year, 1972, Magnus bought substantially all its gasoline from Skelly. (App. 19a-22a).

The court of appeals disagreed. "Because the agreements contained no exclusive dealing clause and did not require plaintiffs to purchase any amounts of gasoline that even approached their requirements, they did not violate § 3 of the Clayton Act." (App. 7a). The court further held that no illegal course of conduct was shown under § 3 of the Clayton Act "because the quantity specified in the agreements amounted to less than 60-80 per cent of plaintiffs' total requirements and plaintiffs regularly purchased 30-50 per cent of their requirements from competitors of the seller." (App. 8a). The fact that plaintiffs bought only from Skelly in *1972* the court held irrelevant, because "their lawsuit is predicated on their *1970-1971* inability to become a Sun distributor and to purchase Jackson Oil Company." (App. 8a, emphasis supplied).[11]

October and November, 1970, Magnus purchased no gasoline at all from Skelly for a period of approximately 58 days (Ex. 386, Tr. 1084-1085). This concerned Skelly for several reasons. First, it did not seem fair to Skelly that Magnus was buying gasoline from other suppliers while it still owed Skelly money for gasoline bought earlier from Skelly (Tr. 1079). Second, it created an oversupply situation at the teminal (Tr. 1079). Third, it meant that Skelly had to extend credit (through credit card purchases) on some other oil company's product (Tr. 1079-1080). Fourth, it resulted in other companies' gasoline being "hauled" by Magnus and sold at retail through the Skelly-owned stations in Sheboygan (Tr. 1080). Last, it resulted in Skelly giving Magnus price discounts (for retail "price protection") on gasoline which Skelly hadn't sold to Magnus (Tr. 626-627, 1072-1077).

[11] The court of appeals also observed: "It would seem especially anomalous that Skelly should terminate the relationship entirely in February 1973 immediately after it had accomplished its asserted goal of requiring Magnus to purchase virtually exclusively from



Second, petitioners did not attempt to define a relevant market and offered no testimony relating to market foreclosure or economic effects. Skelly urged that neither § 1 of the Sherman Act (in a non-per se case) nor § 3 of the Clayton Act could be violated without specific analysis of economic effect in a relevant market. The district court read *Lessig* v. *Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), *cert. denied,* 377 U.S. 993 (1964) as dispensing with specific evidence of market foreclosure under § 3 of the Clayton Act (App. 22a-23a), and found "evidence from which the jury could have concluded that the object of the financing arrangements was to restrain trade" (App. 25a), which the court thought was enough to violate § 1 of the Sherman Act. (*Id.*).

The court of appeals rejected that interpretation of *Lessig*. It said, "the case law is clear that to recover [the plaintiff purchaser] must show a potential foreclosure of competition to the competitors of the seller" (App. 10a),[12] observing that the plaintiff in *Lessig* had established a relevant market and the percentage of competition foreclosed by the arrangements there in question (App. 11a). In the court of appeals, petitioners pursued arguments with regard to three different markets, but the court found the evidence "insufficient to support an inference that competition among Skelly's competitors could have been significantly impaired in any of them." (App. 11a-14a). Thus it concluded that petitioners' Clayton Act claim also failed

Skelly. Its action in doing so supports the inference that both the 1973 and the 1971 terminations were on account of plaintiffs' credit difficulties." (App. 9a, note 15).

[12] See argument at pp. 17-25, *infra*.

on a second ground, for lack of proof of any market foreclosure "the effect of which may be to substantially lessen competition." It found petitioners' Sherman Act claim "fatally lacking" on the same ground for without proof of market foreclosure the restraint could not be held unreasonable. (App. 14a-15a).

Skelly urged two other grounds for judgment *n.o.v.* which the court of appeals did not reach because it concluded that there was no violation of either statute involved.

First, Skelly contended that no violation of the antitrust law by it caused Magnus in 1970 to lose any business opportunities. The district court held that the jury could have inferred causation, despite uncontroverted facts that (a) in 1970 no request was made of Skelly to cancel the leases; (b) nothing in Skelly's arrangements with Magnus precluded Magnus from becoming the Sun Oil Company jobber in Fond du Lac and Oshkosh—it was Sun Oil Company's policy not to sell petroleum products anywhere to a jobber who did some business with another oil company; and (c) no Skelly practice or policy played any role in Magnus' aborted purchase of the Jackson Oil Company's assets (App. 28a-30a).

Second, Skelly argued that proof of damages for violation of the antitrust laws must consist of more than rough estimates of potential profit based on unreliable and, with respect to the Sun Oil Company business, hearsay information. The district court concluded that the damage calculations were not so speculative as to preclude consideration by the jury. It held that Exhibit 145 (on which plaintiffs based the Sun profit calculations) was hearsay admissible under the business record exception (App. 30a-31a).



Respondent does not believe that these questions (which the court of appeals did not reach) are either necessary or proper subjects of a cross-petition for certiorari at this stage of the litigation. *United States* v. *New York Telephone Co.,* 434 U.S. 159, 166 n.8 (1977); *United States* v. *Nobles,* 422 U.S. 225, 241-242, n.16 (1975); *United States* v. *ITT Continental Baking Co.,* 420 U.S. 223, 226-227 n.2 (1974); *Scherk* v. *Alberto-Culver Co.,* 417 U.S. 506, 525 (1973). See generally, 16 Wright, Miller, Cooper & Gressman, *Federal Practice and Procedure: Jurisdiction,* § 4004 (1977) [hereinafter cited as "Wright & Miller"]; Robert L. Stern and Eugene Gressman, *Supreme Court Practice,* pp. 477-487 (5th ed. 1978). They should be addressed first by the court of appeals in the event this Court grants the writ and reverses the court of appeals. *United States* v. *United Continental Tuna Corp.,* 425 U.S. 164, 181-182 (1976); *Wood* v. *Strickland,* 420 U.S. 308, 326-327 (1975); *Dandridge* v. *Williams,* 397 U.S. 471, 475-476 n.6 (1969); *Aetna Cas. & Sur. Co.* v. *Flowers,* 330 U.S. 464, 468 (1947); *United States* v. *Ballard,* 322 U.S. 78, 88 (1944). See generally, 17 Wright & Miller, § 4036, at pp. 27-36 (1977); Stern and Gressman, *id.*

## ARGUMENT

## I.

**The Controlling Decisions Of This Court And All Circuit And District Court Decisions On Point Support The Court Of Appeals' Conclusion That For Purposes Of § 3 Of The Clayton Act There Was Insufficient Evidence Of A Condition, Agreement Or Understanding That Magnus Not Use Or Deal In The Goods Of Competitors Of Skelly.**

The first element requisite to establish substantive liability under § 3 of the Clayton Act is a sale or con-

tract of sale on the condition, agreement or understanding that the purchaser not use or deal in the goods of the seller's competitors. *Standard Oil Co.* v. *United States*, 337 U.S. 293. 298 (1949); *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 327 (1961).

A contract to buy a definite quantity of product over a specified period of time, which does not contain a "requirements" or "exclusive dealing" clause, is not proscribed by § 3 of the Clayton Act. *Tampa Electric Co.* v. *Nashville Coal Co.*, 276 F.2d 766, 771 (6th Cir. 1960), rev'd on other grounds, 365 U.S. 320 (1961); *United States* v. *Standard Oil Co.*, 78 F.Supp. 850, 867 (S.D. Cal. 1948).[13] Accordingly, no express provision of the Franchise Sales Agreement or subleases offends § 3.

[13] The latter case cited is the district court decision that was affirmed by *Standard Oil Co.* v. *United States*, 337 U.S. 293 (1949). In a passage frequently quoted, the district court distinguished as follows between total requirements contracts and contracts to buy a definite quantity:

> When a dealer agrees to take a specific amount of a product, there is the likelihood that *he may*, in case of failure of the supplier to comply with the agreement, or unexpected shortages or increased demands, or a desire to anticipate such shortages or demands, by overstocking,—seek competitive products. There is thus a possibility of access by competitors to the particular outlets. (Emphasis in original.)
>
> Under the "requirements" contracts, the chance is completely cut off. Briefly stated, without a "requirements" contract, competitors may, in time, induce dealers to handle their products. With a contract, they never can.
>
> There is *opportunity to deal with the competitors*, and, hence, possibility,—nay, probability, of freedom of action, when there is no restrictive contract. (Emphasis supplied.) 78 F. Supp. at 867.

Magnus in this case realized the "opportunity to deal with the competitors."



The illegal condition or understanding might also be found in "an extrinsic course of conduct." *McElhenney Co.* v. *Western Auto Supply Co.*, 269 F.2d 332, 338 (4th Cir. 1959). But to prove such a course of conduct (absent express agreement), the plaintiff must prove that an exclusive dealing arrangement actually functioned. In *McElhenney Co.* v. *Western Auto Supply Co., supra,* the leading decision on this point, the Fourth Circuit held that a complaint alleging violation of § 3 of the Clayton Act was properly dismissed for failure to state a claim upon which relief can be granted because during the period when the alleged understanding was in effect, the retailers actually handled competitive articles:

> The complaint itself makes clear that the plaintiffs during the period when the asserted understanding was in effect actually handled competitive articles. 269 F.2d at 338.

*Accord, Davis* v. *Marathon Oil Co.*, 528 F.2d 395 6th Cir. 1975); *Petroleum for Contractors, Inc.* v. *Mobil Oil Corp.*, 1978-2 CCH Trade Cases ¶ 62, 151 at 75,080-81 (S.D.N.Y. 1978). See *Timken Roller Bearing Co.* v. *F.T.C.*, 299 F.2d 839 (6th Cir.), *cert. denied,* 371 U.S. 861 (1962).

There is undisputed evidence that under the Franchise Sales Agreements, subleases and financing agreements, Magnus purchased gasoline, to the extent of 46.4% of its requirements in 1971, 60.7% in 1970 and 45.7% in 1968, from competitors of Skelly (Ex. 418). Mr. Magnus testified that from 1964 through 1971 his firm purchased gasoline in "very substantial amounts" from other suppliers, including Clark Oil, Ashland, Empire Petroleum, Triangle and Marathon. (Tr. 223-

224). Even if Magnus had purchased from Skelly all the quantities specified in the Franchise Sales Agreements, competitors of Skelly had access to no less than 25% of Magnus' requirements in every year. Mr. Magnus himself made no objection to the quantities specified in the contracts; he thought they were "reasonable." (Tr. 222-223). Magnus on occasion bought from other suppliers because it was "cheaper" than buying from Skelly (Tr. 232). Magnus was actually benefiting from price competition between Skelly and other suppliers.

In these circumstances, as the court of appeals held, there can be no violation of § 3 of the Clayton Act for dealing exclusively. Petitioners cite no case the holding of which would dictate a contrary result.

Petitioners' only suggested basis for certiorari on this ground of reversal is that the court of appeals "failed to take into consideration the vital differentiation between Magnus' continuing freedom to purchase unbranded gasoline on the 'spot' market, and Magnus' lack of freedom to purchase branded product under a contemporaneous franchise with any branded competitor of Skelly." (Petition at p. 19). Petitioners' theory is that "[e]xclusive dealing may still be factually found to exist when the franchisee's branded product requirements are confined to franchisor's branded product even though he is not precluded from purchasing nonbranded product on the open market." (*Id.*, heading 3). By "branded" gasoline petitioners apparently mean gasoline sold by a company which owns a tradename or trademark under which the gasoline is ultimately sold at retail (e.g., "Skelly," "Amoco," "Shell"). This theory was not advanced in



the courts below, and for that reason alone this Court should be reluctant to consider it. *Dothard* v. *Rawlinson,* 433 U.S. 321 (1977); *Miree* v. *DeKalb Co.,* 433 U.S. 25 (1977); *Tennessee* v. *Dunlap,* 426 U.S. 312 (1976); *Adickes* v. *S. H. Kress & Co.,* 398 U.S. 144 (1970); *United States* v. *Nobles, supra.* See generally, 17 Wright & Miller § 4036, at pp. 26-29.

Nor does the theory have any basis in the record. Nothing in the Franchise Sales Agreement or leases differentiated between "branded" and "unbranded" gasoline. Nor was there any evidence that Skelly in its dealings with Magnus ever made any such distinction in urging him to buy more gasoline from Skelly.

Logically, the question whether there was an exclusive dealing arrangement for purposes of § 3 should be determined in light of the statutory purpose to protect competition. In that light, the distinction between "unbranded" and "branded" gasoline is meaningless because the only relevant product market is gasoline. That a tradename or trademark is associated with a product does not make it a separate product market. As noted by the court in *Mullis* v. *Arco Petroleum Corp.,* 502 F.2d 290, 298-299 (7th Cir. 1974):

> The fact that an injury to a particular competitor may be unusually severe is not a justification for adopting a market definition which only considers the particular product line [i.e., the Arco brand line of products] which he previously sold or purchased. For in Sherman Act litigation we must adhere to the admonition that the statute is concerned 'with the protection of *competition,* not competitors.' [Citing *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 320 (1962)]. And whether the competition is more intense on the seller's or the buyer's side of the market, we may not arbitrarily

> segregate one brand from equally acceptable substitutes in order to protect a particular competitor from injury.

*Accord, United States* v. *E. I. du Pont de Nemours & Co.,* 351 U.S. 377, 394-404 (1956) (cross-elasticity of demand defines relevant product market); *United States* v. *Arnold, Schwinn & Co.,* 388 U.S. 365, 376 (1967) (in analyzing effect of vertical restraints on competition, "competitive products" in relevant market is presumed to include physically similar products of other brands); *Federal Trade Commission* v. *Borden Co.,* 383 U.S. 637, 644-646, 659-660 (1966) (branded and unbranded milk held to constitute "goods of like grade and quality" for the purposes of § 2a of the Robinson-Patman Act). Since it had no effect on competition in the relevant market, it is irrelevant that Magnus did not or could not (because other oil companies were unwilling) sell the gasoline he purchased from Skelly's competitors under their tradenames.[14] On this point there is no conflict with this Court's decisions or between circuits; nor does it present "an important question of federal law" (Sup. Ct. R. 20).

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[14] *Petitioners cite Lee-Moore Oil Co.* v. *Union Oil Co.,* —— F.2d ——, 1979-1 CCH Trade Cases ¶ 62,651 at pp. 77,690-91 (4th Cir. 1979) for the proposition that the distinction between branded and unbranded gasoline "has recently received judicial cognizance in the context of recoverable damages." Even in that context the distinction was meaningless. After an unlawful contract termination, the plaintiff distributor bought unbranded as well as branded gasoline elsewhere at slightly higher prices, and was allowed to recover as antitrust damage the difference between the price of that gasoline and the terminated contract price. The Fourth Circuit specifically observed that any distinction between "branded" and "unbranded" gasoline was meaningless in the context of relevant product market definition. *Lee-Moore Oil Co.* v. *Union Oil Co., supra* at p. 77,691, citing *Mullis* v. *Arco Petroleum Corp.,* 502 F.2d 290 (7th Cir. 1974).



## II.

**Petitioners' Suggestion That The Standards For Proving Anti-Competitive Effect In Antitrust Cases Should Be Reduced To A More Affordable Level Disregards The Economic Rationale Underlying The Antitrust Laws.**

The court of appeals held that "[e]ven if the franchise sales agreements violated the forepart of § 3 of the Clayton Act, they would not be illegal unless they tended to substantially foreclose competition between Skelly and its competitors in the relevant market." (App. 9a). That is correct. *Tampa Electric Co.* v. *Nashville Coal Co.,* 365 U.S. 320, 327 (1961); *Standard Oil Co.* v. *United States,* 337 U.S. 293, 298 (1949). "[A] case under Section 3 of the Clayton Act . . . must have *specific* evidence of market foreclosure in a *relevant market* in which the exclusive contracts exist." *L. G. Balfour Co.* v. *F.T.C.,* 442 F.2d 1, 19 (7th Cir. 1971) (emphasis added). *Accord, Lupi* v. *Stella D'Oro Biscuit Co.,* 586 F.2d 1163, 1172 (7th Cir. 1978); *Twin City Sportservice, Inc.* v. *Charles O. Finley & Co.,* 512 F.2d 1264 (9th Cir. 1975). In *Tampa Electric, supra,* 365 U.S. at 327-329, this Court prescribed a three-step analysis for substantiality of probable market effect under § 3 of the Clayton Act:

> (1) Identification of the market affected by the restraint;
>
> (2) Determination of the percentage of the relevant market which is affected by the restraint;
>
> (3) Whether the percentage of the market affected, when weighed in connection with a variety of economic factors, is such that the agreement probably has the effect of substantially lessening competition.

Without a market definition there can be no measure of substantiality or analysis of probability of effect, since there is no frame of reference. "[A]n antitrust policy divorced from market considerations would lack any objective benchmarks." *Continental T.V., Inc.* v. *GTE Sylvania, Inc.,* 433 U.S. 36, 53 n.21 (1977).

Except in cases of *"per se"* illegality, the determination of "unreasonableness" under Section 1 of the Sherman Act requires the same economic analysis of market structure and impact. *Continental T.V., Inc.* v. *GTE Sylvania, Inc.,* 433 U.S. 36 (1977); *American Motor Inns, Inc.* v. *Holiday Inns, Inc.,* 521 F.2d 1230 (3d Cir. 1975); *Gough* v. *Rossmoor Corp.,* 585 F.2d 381, 385 (9th Cir. 1978) ("[m]arket definition is essential"); *Lee Klinger Volkswagen* v. *Chrysler Corp.,* 583 F.2d 910, 914-915 n.6 (7th Cir. 1978) ("there must be proof identifying the relevant market and showing the effect thereon"); *Dougherty* v. *Continental Oil Co.,* 579 F.2d 954 (5th Cir. 1978).

Petitioners at trial made no attempt to define a relevant geographic market and prove the percentage of competition foreclosed in that market. The court of appeals thus held, correctly, that they failed to prove a violation of the antitrust laws.

Petitioners ask this Court to consider the court of appeals' facially obvious application of a familiar antitrust principle on two, mutually conflicting, grounds. First, they suggest that expert testimony asserting the existence (not the economic effect) of certain "industry-wide" practices should suffice, since economic data is expensive and difficult or impossible to obtain (Petition, pp. 15-18, point 1). This suggests that the relevant geographic market is national. But then they argue that the relevant market should be limited to the "community" of "greater Sheboygan." (Petition, pp. 20-22). Both these suggestions were analyzed and rejected by the court of appeals for lack of record support and stark inconsistency with established antitrust jurisprudence. (App. 11a-14a).



Clearly the level of competition affected is that affected by the vice inhering in an exclusive dealing arrangement: the market in which the arrangement excludes the supplier's competitors from the purchaser's business. *Tampa Electric, supra,* 365 U.S. at 327;[15] *Southern Concrete Co.* v. *United States Steel Corp.,* 535 F.2d 313, 318 (5th Cir. 1976) *cert. denied,* 429 U.S. 1096 (1977). Competitors of Skelly were allegedly restrained from access to Magnus' business by Skelly's contractual arrangements, and it is competition between Skelly's competitors for jobbers' business that is the pertinent level of competition.

The only evidence specifically relating to a relevant market and economic effect in that market was Skelly's economist's uncontradicted testimony concerning the Wisconsin market. He explained that the market relevant to Magnus' Skelly franchise was a thirteen-county area within a radius of 62 miles from Sheboygan. (Tr. 688-691, 698, 711, Exs. 411, 419). This was "the market in which the particular jobber [Magnus] could pur-

[15] The pertinent language in *Tampa* is quoted as follows at page 20 of the Petition:

> ". . . [T]he area of effective competition in the known line of commerce must be charted by careful selection of the market area in which the seller operates, and to which the *purchaser* can practicably turn for supplies." (Petitioners' emphasis.)

Petitioners' implication that "purchaser" means the ultimate retail consumer is patently wrong. There has never been any doubt that the "purchaser" referred to is the purchaser from the seller whose sale or contract for sale allegedly violates § 3. The market area to which some other purchaser turns for supplies at another point in the distribution chain is economically irrelevant.

chase product and resell it profitably . . ." (Tr. 699). Market definition was based principally on an analysis of the area in which Magnus actually purchased product over the period of time in question (Tr. 698-699, Exs. 411, 419).[16] Having determined the volume of gasoline sales in the thirteen-county area (Tr. 701-710), the economist determined the percentages of that market held by Magnus during 1964-1975. (Tr. 710-713). Magnus had substantially less than one half of 1% of the relevant market in each year. The economist concluded that "this approaches what the economists call the 'perfect competitor'; in other words, it was such a small participant that it couldn't in any way influence the market." (Tr. 714).[17]

The court of appeals agreed. (App. 14a, 15a). Even if "greater Sheboygan" (the parameters of which are not defined of record) were the relevant geographic market, there was no evidence of foreclosure in that

[16] The market defined is substantially smaller than the relevant market criterion of 100 miles established by the Federal Trade Commission for the petroleum jobber industry. (Tr. 700).

[17] In addition to the showing of *de minimis* market effects in the relevant Wisconsin market, Skelly's economist's testimony also showed that there were many buyers with which Skelly's competitors could have dealt (Tr. 718-720) and that competition had actually flourished in Wisconsin. Exhibit 420 showed that between 1964 and 1974 the five leading gasoline suppliers in Wisconsin lost market shares, middle-sized and smaller competitors increased their market shares, and some seven new competitors entered the market. Concentration of the market was significantly diluted and competition during that period was "substantial," "intense," and "sustained." (Tr. 720-723). There was no evidence to the contrary. The economist's undisputed conclusion was thus compelled:

> . . . the imperceptible percentage of the market that was accounted for by the Skelly-Magnus operation makes it logically impossible for anything that was done by Skelly or Magnus at this point in time in this market to have any effect on competition. (Tr. 724).



market. To the contrary, as the court of appeals observed, "[t]he evidence does not establish that Skelly's competitors were foreclosed even from the greater Sheboygan area since (1) as indicated, plaintiffs bought a significant portion of their requirements from Skelly's competitors, (2) only three of the ten stations supplied by plaintiffs were subject to the financing agreements, and (3) there was evidence of vigorous inter-brand competition in Sheboygan." (App. 13a-14a).

As for petitioners' reference to "industry-wide practice," no evidence was offered concerning "exclusive dealing" by Skelly's competitors. There was generalized testimony by a former Shell Oil Company manager that "dual branding" (selling gasoline under competing tradenames, or selling gasoline purchased from one oil company under another's tradename) was frowned upon in the industry, and that many oil companies had financing arrangements similar to Skelly's. (Tr. 181-184, 341-343, 358). There was no evidence, however of the contents of any particular oil company's arrangements, and no evidence whatsoever of any express or implied exclusive dealing requirement imposed by any such company.[18]

Even if "industry-wide" practices were established, the evidence concerning them was so vague as to pre-

[18] Quite apart from the vague and non-specific nature of this testimony, petitioners' evidence was not competent to prove even the most amorphous "industry-wide practice." They rely upon testimony (Tr. 341-343, 358) that the Skelly-Magnus franchise agreements were representative of industry-wide practice, and that the coercion inherent there is derived from an industry-wide policy against dual distribution. Important as they thought such a showing was to their case, however, they never introduced into evidence even one of the financing agreements which were supposed to abound in the industry. Their "industry" witness failed to testify to a single instance in which the putative policy against dual dis-

clude their consideration for purposes of such economic analysis in this case. The only testimony that such arrangements affected competition at all came from petitioners' economist, Dr. Allvine, who gave his opinion as a general proposition, in the abstract, without reference to any relevant market. His opinion was that the type of contracts involved here "greatly reduce competition and the ability of a jobber to seek a new supplier." (Tr. 377-378).

The court of appeals quite properly discounted this testimony because it had no basis in economic fact. (App. 15a, n.26). *American Motor Inns, Inc.* v. *Holiday Inns, Inc.,* 521 F.2d 1230, 1247 (3d Cir. 1975). Opinion evidence like this is not substantial evidence and cannot be accorded any weight in discharging plaintiffs' burden of proving the elements of their claim:

> Opinion evidence without any support in the demonstration and physical facts, is not substantial evidence. Opinion evidence is only as good as the facts upon which it is based.

*State of Washington* v. *United States,* 214 F.2d 33, 43 (9th Cir. 1954). *Accord, Naumkeag Theaters Co.* v. *New England Theaters, Inc.,* 345 F.2d 910, 913 (1st Cir. 1965), *cert. denied,* 382 U.S. 906 (1966); *Ayers* v. *Pastime Amusement Co.,* 283 F.Supp. 773 (D. S.C. 1968). *Galloway* v. *United States,* 319 U.S. 372, 387 (1943) explains the policy:

> No case has been cited and none has been found in which inference, however expert, has been permitted to make so broad a leap and take the place of evidence which, according to all reason, must have been at hand. To allow this would permit the substitution of inference, tenuous at best, not merely for evidence absent because impossible or difficult to secure, but for evidence disclosed to be available and not produced. This would substitute speculation for proof.

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tribution was applied to the detriment of a jobber or retailer. Petitioners' "evidence" regarding industry-wide practices was unsubstantiated by any reference to specific substantive facts.



Petitioners rely on *Lessig* v. *Tidewater Oil Company,* 327 F.2d 459, 468 (9th Cir.), *cert. denied,* 377 U.S. 993 (1964) for the proposition that data-based economic analysis is not always required. (Petition, pp. 17-18). As the court of appeals stressed (App. 10a-11a), that reliance is misplaced because in *Lessig* the plaintiff proved a relevant market, defendant's market share, the number of stations under substantially similar requirements contracts, the total volume of petroleum products sold through those stations, and the share of the market represented by petroleum sales and the total volume of TBA sales through those stations. When the *Lessig* quotation that petitioners cite (327 F.2d at 468, cited at Petition, p. 17) is placed in context, it is clear that the Ninth Circuit was addressing only the lack of proof of total TBA sales; the court was merely saying, in effect, that proof of violation by exclusive dealing on TBA does not necessarily require proof of the percentage of the TBA market foreclosed when the substantiality of foreclosure in that market can be inferred from other evidence in the case.[19]

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[19] If *Lessig* excused an antitrust plaintiff from specifically proving a relevant market and demonstrating economic effects therein, then *Lessig* would be inconsistent with *Continental T.V., Inc.* v. *GTE Sylvania, Inc.,* 433 U.S. 36 (1977).

That is precisely the kind of economic evidence which petitioners could have developed and offered here. They could have discovered

—the number of Skelly franchise sales agreements in effect with jobbers or dealers;

—the number and location of Skelly financing agreements in effect;

—the geographic areas in which Skelly dealers or jobbers under the franchise or financing agreements actually operated;

—the gallonage volumes (or the dollar value representation thereof) sold by Skelly to jobbers under franchise or financing agreements;

—the gallonage volumes (or dollar value representation thereof) sold by Skelly, within the relevant market, to buyers who were not under franchise or financing agreements;

—the number and identity of suppliers that competed with Skelly in the relevant market;

—the gallonage volumes (or dollar value represented thereby) sold by such competitors in the relevant market;

—the total gallonage volume (or dollar value represented thereby) sold by all suppliers in the relevant market;

—the proportion of any relevant market purportedly affected by any such Skelly agreements.

Here there was no such evidence. In *Standard Oil Co.,* as in *Tampa Electric,* there was specific evidence of all these factors. No market analysis can be made without them.



Granted, such evidence is expensive to discover and develop. But to make antitrust litigation less expensive for plaintiffs is hardly a reason to abandon the economic rationale for the antitrust laws. In any event, antitrust plaintiffs are not prejudiced by the expense, since they recover it, if successful, under § 4 of the Clayton Act, 15 U.S.C. § 15.

## CONCLUSION

This case does not meet the standards set by this Court for issuance of a writ of certiorari. There are no special and important reasons for review of the Seventh Circuit decision. There has been no demonstration that the Seventh Circuit failed to apply established antitrust principles to the facts of this case. There is no conflict between circuits on any question presented. For these reasons, respondent respectfully submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

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*Attorneys for Respondent*

*Of Counsel:*

John F. Smith
General Attorney
Getty Refining and
Marketing Company

September 21, 1979

# APPENDIX.

# APPENDIX

## Defendant's Exhibit No. 418

Sources: Skelly Oil Company
Wisconsin Department of Revenue

*Gasoline Sales Table (Magnus)*
(In Thousands)

| Year | Magnus | Magnus Others | Magnus Skelly | Magnus % Skelly | Franch. Sales Agrmt. | Subleases |
|---|---|---|---|---|---|---|
| 1964 | 840 | 272 | 568 | 63.6 | 810,000 | 100,000 |
| 1965 | 1,057 | 358 | 699 | 66.1 | 810,000 | 100,000 |
| 1966 | 1,068 | 304 | 764 | 71.3 | 701,100 | 300,000 |
| 1967 | 1,168 | 436 | 732 | 62.6 | 701,100 | 300,000 |
| 1968 | 1,102 | 503 | 599 | 54.3 | 701,100 | 300,000 |
| 1969 | 1,211 | 291 | 920 | 75.9 | 701,100 | 300,000 |
| 1970 | 996 | 604 | 392 | 39.3 | 701,100 | 300,000 |
| 1971 | 1,222 | 566 | 655 | 53.6 | 701,100 | 300,000 |
| 1972 | 1,895 | 7 | 1,888 | 99.6 | 701,100 | 300,000 |
| 1973 | 777 | 176 | 601 | 77.3 | | |
| 1974 | 2,224 | 506 | 1,718 | 77.2 | | |
| 1975 | 1,928 | | 1,928 | 100. | | |
| SOURCE | Wis. Tax Reports Chart | Wis. Tax Reports Chart | Wis. Tax Reports; Skelly Oil Co. | Wis. Tax Reports Chart | Feb. 28, 1964 March 1, 1966 | 100,000 gals. for 3 financed stations |

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

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**No. 79-279**

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MAGNUS PETROLEUM COMPANY, INC. AND
MARPAT CORPORATION,

*Petitioners*

v.

SKELLY OIL COMPANY,

*Respondent*

---

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit**

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## PETITIONERS' REPLY MEMORANDUM

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*Counsel for Petitioners*

October 9, 1979

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## TABLE OF AUTHORITIES

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## PETITIONERS' REPLY MEMORANDUM

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### PETITIONERS' ARGUMENTS IN REPLY

**1. The Misconstrued Precedent that "Antitrust Laws Protect Competition, Not Competitors" Must be Tempered To Reflect a Judicial Perspective Which Requires Flexibility in its Application Where, As in the Realities of Gasoline Marketing, Individual Competitors Must Be Protected in the Very Interests of Preserving Competition.**

Respondent urges that in reversing the District Court, the court below faithfully adhered to consistently followed precedent. However, when the very rigidness of that consistency has the effect of passing over the substantive considerations which gave rise to the precedent in favor of merely manifesting an inflexible loyalty to precedent for precedent's sake, then it is quite appropriate for this sovereign Court which is not bound by precedent (even its own), to undertake the tempering of such rigidity with an injection of judicial perspective.

When there are those in a position to know that a challenged restrictive practice is one of long standing prevalence throughout an industry, then the testimony of such experts should suffice when their testimony bears witness to that practice, its enduring prevalence, and the parallel restrictiveness among the major competitors in every relevant geographic market of both the object and effect of that practice. The presently prevailing judicial insistence on comprehensive economic data and analysis as applied in the instant case essentially requires virtually unavailable economic proof of a practice, the long standing prevalence of which is so well known in the involved industry as to be virtually axiomatic.

Even Skelly itself adamantly refused to disclose such matters to Magnus in the instant case. The very type categories of comprehensive data as Skelly lists at p. 24 of its "Brief of Respondent" was sought by Magnus' Interrogatory No. 11, appended *infra* at p. 1 a. Skelly's reply to that discovery effort, appended *infra* at p. 3 a, is as follows:

> "Defendant objects to Interrogatory No. 11 on the grounds that it is vague and ambiguous and is irrelevant to the subject matter and not reasonably calculated to lead to the discovery of admissible evidence."



Moreover, during trial Skelly succeeded in its objection to Magnus' endeavor to elicit exclusive dealing specifics with respect to another competing major brand. The following transpired during Magnus' direct examination of John J. Wilson, a former Texaco jobber:

> Q. And with respect to your operation, to what extent did that supply commitment relate, to how much of your total operation?
>
> A. You mean as far as what we contracted for?
>
> Q. As a minimum.
>
> MR. PARSONS: Your Honor, it's belated, but objection on the grounds of relevancy. The terms of this man's arrangements with Texaco don't bear any relation to the issue here. (369-372).[1]

With such roadblocks being encountered by a private enforcement plaintiff just from the other party to the litigation, it is not difficult to envision the barrage of more deserving objections that he can realistically expect from a battery of lawyers representing nonparties whose comprehensive data he would need to meet the prohibitive burden which Skelly has called for and which the court below has embraced. And, the court below expressly recognized that "[i]t was impossible to estimate the amount of Skelly gallons sold through Skelly-financed stations," since such record

[1]The Court of Appeals dismissed the cross-appeal addressed to the sustaining of this objection. (Petition, p. 16a, n.27).

keeping never comes into existence. (Petition, pp. 16, 12a). For the same reason, the same impossibility would apply to each of Skelly's competitors, as well.[2] Indicative of the prohibitive cost to a small business in garnering even the most rudimentary data is the $11,000 expenditure which Skelly incurred in the instant case just to prove the obvious correlation that exists between where people live and where they purchase gasoline for their automobiles. (702-710, 755).

Nor would the obviation of the need of comprehensive economic data and analysis by the use instead of expert testimony as to the fact of such long standing prevalence, do violence to the principle expressed in *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 53 n. 21 (1977), that "an antitrust policy divorced from market considerations would lack any objective benchmarks." This, because the fact of anticompetitive impact is manifest from just the fact of the widespread extent of the *offers* by the various oil companies to their respective franchised jobbers of the lock-in entrapment which the long-standing, prevalent lease/lease-back/franchise device is designed to permit. Particularly, when such prevalence is throughout an industry comprised of consciously interdependent, behaviorally parallel competitors, such as exist in the gasoline marketing segment of the oil industry throughout the United States.

[2]Plaintiffs' Exhibit 181 did present statistics published in the 1972 and 1973 issues of the National Petroleum News Factbook setting forth for each oil company the number of each company's branded service stations as are "Supplied direct" and the number that are "Supplied through distributors", as well as the number of branded retail outlets that each company markets through in each state. Such is the extent of the detail so published.



While the paths of reasoning may differ, under such circumstances there is no more ultimate justification for rigidly burdening the private enforcement antitrust plaintiff with the virtually impossible requirement of quantifying that manifest fact of adverse impact upon competition than there would be to rigidly requiring him to comprehensively quantify the extent of his own resulting damages once he has established the requisite fact of damage. This Court dispensed with the burden of a comprehensive quantification of damages in *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946), whenever it would be unrealistic to require more than a reasonable estimate based on relevant data. So, also, should this Court take the opportunity which the instant case affords to direct the lower courts to dispense with their rigid insistence upon a comprehensive quantification of adverse market impact when either such evidence would be impossible to obtain, or if possible only so at a prohibitive cost which the smaller business victims of anticompetitive conduct simply could not afford, and when the challenged restrictive practice is one of long standing prevalence throughout an industry.

To do less is to continue the confinement of such small business victims to antitrust relief only from obvious and egregious instances of unlawful price fixing and other *per se* type conduct—a limited access that is hardly in keeping with the underlying social and political purpose of the antitrust laws. Certainly, the antitrust laws were conceived, at least in part, with the underlying social and political purpose of preserving the competitive opportunities of small business. In the simple interests of justice, the goals of those laws must not be permitted to be myopically perceived in terms of only economic efficiencies. As Judge Lear-

ned Hand stated in *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 247 (2d Cir. 1945):

> ". . . Congress . . . did not condone 'good trusts' and condemn 'bad' ones; it forbad all. Moreover, in so doing it was *not necessarily actuated by economic motives alone*. It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few. These considerations, which we have suggested only as possible purposes of the Act, we think the decisions prove to have been in fact its purposes." (Emphasis added.)

For a more recent discussion of the non-economic component of American antitrust policy and the non-economic goal of strengthening and preserving the competitive position of small concerns (even if need be at some economic cost), that inheres in the interrelated network of congressional legislation that comprise and supplement the antitrust laws, see Louis B. Schwartz, *"Justice" and Other Non-Economic Goals of Antitrust*, 127 U. Penn. L.R. 1076 (1979), in which the author states at p. 1078:

> "The dogma that 'antitrust laws protect competition not competitors' overstates the case and ignores considerations of justice. One must amend that declaration by adding at least the following qualification: 'unless individual competitors must be protected in the interests of preserving competition.' "

This qualification is particularly essential with respect to gasoline marketing, where the small entrepreneur is fast becoming a vanishing species.[3]

[3]The Dayton Daily News newspaper published an article in its issue of Thursday, August 16, 1979, entitled *"Independent gas dealers vanish at alarming rate,"* setting forth the following, *inter alia:*

> ". . . Statistics compiled for a House [of Representatives] subcommittee show that almost 100,000 small gasoline dealers have gone out of business since 1972. The volume of gasoline sold by refiner-operated stations almost doubled during the same time period.
>
> . . .'With consumption of branded gasoline virtually unchanged and gasoline prices tripling since 1972, it would appear that more than just natural market forces may be accountable for the disappearance of these small businesses,' the report said."

The entire article is appended hereto *infra* at p. 5 a.



The current trend of interpretation of the antitrust laws, in which respondent rejoices and to which the reasoning behind the reversal in the court below adheres, promotes an elimination of competition by effectively sanctioning the removal of competitors.

**2. Question 3 of the Petition Addressing the Failure of the Court of Appeals to Consider With Respect to the Exclusive Dealing Condition Proscribed By §3 of the Clayton Act, the Vital Differentiation Between Branded and Unbranded Gasoline, is Properly Before This Court Because It Was Presented To The Court of Appeals.**

Respondent is in error in its argument at pp. 14-15 of its brief that the subject of Petitioners' Question 3 should not be considered by this Court because "[t]his theory was not advanced in the courts below." The very essence of Magnus' challenge at trial and on appeal was addressed to Skelly, in conjunction with the well-known, industry-wide prohibition against "dual distribution," using its financing instruments with its jobbers to effectively make those jobbers unavailable for undertaking the franchised brand of Skelly's competitors. This, by Skelly using those instruments as it

does to lock the jobber into the Skelly franchise for many years beyond the facial five year term of that franchise, being until the expiration of the full fifteen year term of the most recent financing lease.[4]

Moreover, the point was expressly reemphasized before the Court of Appeals in Magnus' petition for rehearing and suggestion for rehearing *in banc.* At p. 11 thereof, Magnus stated:

> ". . . [T]he Panel has failed to take into consideration the vital differentiation between Magnus' continuing freedom to purchase unbranded gasoline on the "spot" market, and Magnus' lack of freedom to purchase branded product under a contemporaneous franchise with any branded competitor of Skelly. . . .Skelly. . .knew. . .that unless Magnus was willing to walk away from its financed stations, that the continuation of the Skelly franchise until the financing leases would run their full 15 year terms would effectively disenable Magnus from undertaking the purchase of any branded product under the franchise of any branded competitor of Skelly for the full length of those leases. So, in the realistic context of brand competition and branded competitors, Magnus was indeed restricted exclusively to Skelly. (170-71, 109-110, 161-63, 415-16, 627, 343, 351-56)."

[4]Magnus' own experience when he dared seek a mutual cancellation of the franchise effective July 1, 1968, reflects the stark peril which the device permitted. Arthur Magnus testified thusly:

> [Skelly's Sales Representative, Richard Terwilliger] said, "Well, you must understand that if we honor this request and cancel your franchise that the three service stations that are financed with us will remain with us, and whatever you do . . . whatever products you handle, Skelly Products will be in those three service stations; and, in addition to that, your monthly payments of $1180.00 will have to continue for the balance of the fifteen-year period, and we have the prerogative then of renting it for [I know he said] a dollar a year."

> . . ."Do you really want to continue this letter, to go through the channels to cancel the lease or cancel the contract?" And I said, "Well, I can't very well afford $1180.00 a month and not be able to control my own stations." And he said, "Well, if you raise too much hell about it," he said, "we have—we can cancel any time on the terms of the franchise which will leave those stations to our disposition and you'll be without them at any time." So, he just suggested that I don't make a lot of noise about it, unless I want to go ahead with the consequences that he had just proposed to me. Well, the upshot of the meeting was that I decided that I'd better not—I told him to just forget the whole thing really is what it amounted to. (162-63).



In any event, even *arguendo* if the Court of Appeals be deemed correct in its holding that Skelly did not impose the exclusive dealing condition required for a violation of §3 of the Clayton Act, the absence of such condition would not be fatal to Magnus' §1, Sherman Act claim because §1 of the Sherman Act does not require the existence of any such condition before the lease/leaseback/franchise device may be deemed a contractual arrangement in unreasonable restraint of trade: "[T]he contracts may yet be banned by §1 if unreasonable restraint was either their object or effect." *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 614 (1953). Also, *Cities Service Oil Company* v. *Coleman Oil Company, Inc.*, 470 F. 2d 925, 930 (1st Cir. 1972), *cert. denied*, 411 U.S. 967 (1973).[5]

[5]The §1, Sherman Act claim is substantively addressed at pp. 22-24 of the Petition.

## CONCLUSION

For the reasons set forth above, as well as those contained in the Petition, petitioners pray this Court to grant the Petition and review the judgment and opinion below.

Respectfully submitted,

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Telephone: (513) 278-4858
*Counsel for Petitioners*

October 9, 1979

## APPENDIX.

**Filed with Clerk of**
**U.S. District Court on**
**July 3, 1975**

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
Civil Action No. 73-C-355

MAGNUS PETROLEUM COMPANY, INC.
AND MARPAT CORPORATION,
*Plaintiffs,*

vs.

SKELLY OIL COMPANY,
*Defendant.*

**Defendant's Answers To Plaintiffs' First Set of Interrogatories**

TO: IRVING I. SAUL, ESQ.
6929 North Main Street
Dayton, Ohio 45415

EUGENE F. HODSON, ESQ.
601 North Fifth Street
Sheboygan, Wisconsin 53081

Defendant Skelly Oil Company, by its Senior Counsel John F. Smith, answers plaintiffs' First Set of Interrogatories as follows:

[Interrogatory 1-10. Deleted in Printing]

**Interrogatory 11.**

11. For the period from January 1, 1968, to the present, identify each retail level gasoline station outlet located in Wisconsin owned (directly or indirectly), operated or supplied directly by Skelly, answering separately as to each, and for each such retail level gasoline station outlet ("outlet"), state the following:

(a) The approximate date on which each outlet commenced business, and, if no longer doing business, the approximate date of cessation thereof.

(b) Describe all petroleum products sold or marketed at or by each outlet.

(c) State, by month and by year, the volume and amount of petroleum products sold or marketed at or by each outlet, and the manufacturer, refiner, or supplier thereof, respectively.

(d) State the colors, brand or insignia under which each outlet sells or markets petroleum products; and if there has been a change in said colors, brand or insignia, state the approximate date of each such change, and identify each successive colors, brand or insignia.

(e) State whether each outlet and the real property on which it is or was located, answering separately as to each, is or was owned by, leased from, subleased from, or operated under license from Skelly.

(f) State the net profits derived therefrom or realized by Skelly on the sale, consignment, or delivery of petroleum products to each such outlet, by month and by year.



(g) State the margin, in cents per gallon, realized by Skelly by month and by year on the sale, consignment or delivery of petroleum products to each such outlet.

(h) State all business activities carried out or conducted, other than the sale or marketing of petroleum products, at each such outlet, as set forth in net profits derived therefrom or realized by defendant on account of or by virtue of all such business activities, answering separately for each such business activity.

(i) Identify the manager or other person performing similar duties at each such outlet.

**Reply**

Defendant objects to Interrogatory No. 11 on the grounds that it is vague and ambiguous and is irrelevant to the subject matter and not reasonably calculated to lead to the discovery of admissible evidence.

[Interrogatory 12-24. Deleted in Printing]

**Interrogatory 25.**

25. Identify all persons who supplied information for these Interrogatories and specify those answers as to which each such person supplied information.

**Reply**

Interrogatory Nos. 1 and 2. D.R. Luke, E.J. Peterson, Gorman Smith, Richard Terwilliger, George Merlino, Doug Evans.

Interrogatory No. 3. Payroll Department, Skelly Oil Company.

Interrogatory Nos. 4 and 5. Donald Spears, D.L. Edwards, T.J. Mason.

Interrogatory No. 6. Self-evident.

Interrogatory Nos. 7 and 8. John F. Smith.

Interrogatory No. 13. R.J. Dent.

Interrogatory No. 21. John F. Smith.

Interrogatory No. 23. Company records.

Plaintiffs' first set of interrogatories cut across lines which are not clearly defined and bits and pieces of information necessary to answer them were certainly gathered from other than those mentioned above. However, substantial and good faith compliance with plaintiffs' request has been attempted.

Dated: July 1, 1975.

JOHN F. SMITH, SENIOR COUNSEL
Skelly Oil Company

Subscribed and sworn to before me
this 1st day of July, 1975.

LOUISE N. LAIN
Notary Public, State of Oklahoma
My commission expires: Aug. 24, 1975



**Dayton Daily News**
**Thurs., Aug. 16, 1979**

***Independent gas dealers vanish at alarming rate***

WASHINGTON (AP)—Oil refiners are increasing their share of the retail gasoline market in the United States, while independent gasoline stations disappear at an alarming rate, House investigators said today.

Statistics compiled for a House subcommittee show that almost 100,000 small gasoline dealers have gone out of business since 1972. The volume of gasoline sold by refiner-operated stations almost doubled during the same time period.

"There is no question about it, the small independent gasoline dealer is in trouble," said Rep. Berkley Bedell, D-Iowa, chairman of the small business subcommittee on antitrust and restraint of trade. "Perhaps it would be more accurate to say he is in danger . . . of becoming a vanishing species."

His remarks were prepared for subcommittee hearings today in Sioux City, Iowa, on gasoline marketing practices.

THE SUBCOMMITTEE REPORT says the average monthly sales volume at refiner-operated stations is 2.5 times that of independent dealers.

It says more than 57,000 dealers who leased stations from oil companies have gone out of business since 1972 and almost 41,000 dealers who owned their own stations quite the business during the same period.

"With consumption of branded gasoline virtually unchanged and gasoline prices tripling since 1972, it would appear that more than just natural market forces may be accountable for the disappearance of these small businesses," the report said.